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44
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REPORTS

OF

PRACTICE CASES



DETERMINED

IN THE

COURTS OF THE STATE OF NEW YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD
NEW YORK REPORTS ISSUED DURING THE PERIOD
COVERED BY THIS VOLUME.

BY ABBOTT BROTHERS,
COUNSELLORS AT LAW.

VOL. XI.

NEW YORK:
JOHN S. VOORHIES, LAW BOOKSELLER AND PUBLISHER,
20 NASSAU-STREET.
1861.

[Entered, according to Act of Congress, in the year One Thousand Eight Hundred and Sixty,
by ABBOTT BROTHERS, in the Clerk's Office of the District Court for the Southern District
of New York.]

Rec. Mch. 18, 1861

RENNIE, SHEA & LINDSAY,
STEREOTYPERS AND ELECTROTYPERS,
81, 83, and 85 Centre-street,
NEW YORK.

BAKER & GODWIN, PRINTERS,
Nassau, cor. Spruce Street.

OR

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ABBOTTS'
PRACTICE REPORTS.

NEW YORK.

GORDON *a.* GAFFEY.

Supreme Court, Third District; Special Term, March, 1859.

ATTACHMENT.—ACTION FOR THE RECOVERY OF MONEY.

The Code does not authorize an attachment as a provisional remedy, in actions for wrongs.

Motion to set aside warrant of attachment as unauthorized by law.

The facts are stated in the opinion of the court.

H. Smith, for the motion.

C. A. Runkle, opposed.

HOGEBROOM, J.—The summons in this action gives notice that “the plaintiff will apply to the court for the *relief* demanded in the complaint.”

The complaint alleges that the barn, shed, and cornerib of the plaintiff, in Schoharie county, were destroyed by fire in August last; that they contained hay, fowls, buckwheat, sleighs, forks, rakes, shovels, and various other farming utensils, the property of the plaintiff, which were also destroyed by fire;

VOL. XL—1

Gordon a. Gaffey.

the said barn, shed, corncrib, and the contents thereof, being of the value of \$1100; that said buildings were *set on fire* by defendant, and thereby said buildings and their contents destroyed, and that the defendant wrongfully and designedly destroyed the same; that in consequence thereof plaintiff has suffered additional damage to the amount of \$100, in the inconvenience, loss, and expense of being deprived of their use, and in gathering and storing the produce of his farm. The complaint claims damages to the amount of \$1200. Upon the summons and complaint, and an affidavit stating substantially these facts, and further stating facts tending to show that the defendant has absconded or is concealed, the plaintiff obtained from the county judge of Schoharie county a warrant of attachment against the property of the defendant, which the defendant now moves to set aside, upon the ground that the attachment is unauthorized by law.

I am of opinion that the motion should be granted, for the following reasons:

1. Section 277 of the Code authorizes an attachment "in an action for the *recovery of money*." This language must receive a reasonable construction in view of the probable intent of the Legislature, and former statutes regulating attachments against property. I think it refers to cases where a *sum of money* is specified in the summons, as the sum for which the plaintiff will take judgment, if the defendant fail to answer the complaint. (*Code*, § 129.)

2. The attachments authorized by the Revised Statutes were limited to cases where the action was upon contract, and where the relation of debtor and creditor existed. Although the relief is extended under the Code, I see no reason to believe that the remedy was intended to embrace torts or wrongs. Section 227 speaks of an assignment, or disposition of property with intent to *defraud creditors*, as one of the cases authorizing an attachment. Section 229 requires the amount of the *claim* to be specified in the affidavit. Section 231 provides that the attachment shall require the sheriff to attach so much of the property as shall be sufficient to satisfy the plaintiff's *demand*.

3. If the plaintiff is right in his construction of the statute, then a warrant of attachment may be issued in all cases of tres-

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pass, trover, slander, libel, assault and battery, and kindred actions.

This would be an entirely new construction of the phrase, an action "for the recovery of money," and was not, I think, contemplated by the Legislature. (See *The People v. Bennett*, 6 *Abbotts' Pr.*, 343; *Tuttle v. Smith*, *Ib.*, 329; *S. C.*, 14 *How. Pr.*, 395; *West v. Brewster*, 1 *Duer*, 647; *Hyde Park v. Teller*, 8 *How. Pr.*, 504; *Field v. Morse*, 7 *Ib.*, 12; *Voorhies v. Scofield*, *Ib.*, 51.)

4. In regard to the case of *Ward v. Bigg* (18 *Barb.*, 139), it is sufficient to say it does not cover the case. It was both an action upon *contract*, and the summons was for the *recovery of money*. In regard to the case of *Hernstein v. Matthews* (5 *How. Pr.*, 196), so far as it discusses the question involved in this case, I think it was not well decided.

Without further enlarging upon the considerations which favor the conclusion, that the present is not one of the cases in which the Legislature intended an attachment to issue, I am of opinion that the warrant of attachment should be set aside, with ten dollars costs.

 WILSON v. DUNCAN.

New York Superior Court; General Term, July, 1860.

ATTACHMENT.—INTERPLEADER.—MOTION TO SUBSTITUTE ADVERSE CLAIMANT AS DEFENDANT.—APPEAL.

Notice of an attachment against all defendant's property, is insufficient under section 235 of the Code.

Of the grounds on which an order of interpleader may be granted under the Code.

An order under section 122 of the Code, substituting an adverse claimant as a defendant, is appealable.

Appeal from an order made on a motion by defendants, to substitute an adverse claimant of the fund in suit as defendant.

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The decision of the motion is reported 8 *Ante*, 354.

BY THE COURT.—ROBERTSON, J.—This action is brought, as appears by the complaint therein, to recover a balance of \$53,000 deposited with the defendants as a loan, on the 30th day of June, 1858, by the firm of L. O. Wilson & Co., and assigned on that day by Wilson & Co. to the present plaintiffs, of which notice was given to the defendants on the 1st day of July, 1858.

On the 3d day of July, 1858, the defendants received a notice from the members of the firm of J. W. Paige & Co., stating the commencement of an action by them in the Supreme Court of this State against the members of the firm of L. O. Wilson & Co., in which they claimed an equitable lien upon all the effects of that firm, by reason of a special agreement made in October previous,—stated the issuing of an injunction in that action restraining the defendants therein from making any disposition of their property owned in October previous, or its proceeds, and still in force,—mentioned an assignment by such defendants, in defiance of such injunction to the present plaintiffs,—and insisted that Paige & Co. would claim that any assignment was subordinate to their claim, and that they had a lien upon the funds in the hands of the present defendants, amounting to \$49,000. Such notice did not set forth the terms of such special agreement, or otherwise specify the grounds of such equitable lien, or any facts to sustain it, nor did it claim that the assignment to the present plaintiff was void.

On the 3d day of August, 1858, the present defendants received from the sheriff of the city and county of New York, copies of two warrants of attachment, commanding him to attach and safely keep so much of the property of Lewis O. Wilson as should satisfy the demands of J. W. Paige and others, plaintiffs in the action in which such attachments were issued, with notices that they were such copies, and that “all the property, debts, and credits of L. O. Wilson,” then in their possession or under their control, would be liable to such warrants, and that they were required to deliver all such property to the sheriff, with a certificate thereof.

The order from which the appeal is now taken, was made upon an application by the defendant under the Code (§ 122) to

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substitute the members of the firm of J. W. Paige & Co., and the sheriff, as defendants in their place, and to be discharged from all liability, on depositing with the New York Life Insurance and Trust Company the sum claimed.

The application was founded upon an affidavit of one of the defendants; this affidavit alleges the receipt of the three notices before mentioned, and that the members of the firm of J. W. Paige & Co., and the sheriff, claim by the virtue of the lien mentioned in the notice of the former, and the attachment. It also alleges, that both claim and insist that the assignment by L. O. Wilson & Co. to the plaintiffs is void as against J. W. Paige & Co., as creditors of the former, for reasons appearing on its face, and also on the ground that the same was executed in fraud of their rights, arising from facts stated in their notice, and with intent to hinder, delay, and defraud the creditors of L. O. Wilson & Co.; but no facts are alleged to have been stated, or to exist to support such charge. Such affidavit further alleges that the present plaintiffs have been made defendants in the first action brought by J. W. Paige & Co., by a supplemental complaint, and that a portion of the relief sought therein is, to set aside the assignment to the plaintiffs as fraudulent and void.

In the original complaint in the action in the Supreme Court, by Paige & Co., against L. O. Wilson & Co., they demand judgment, that the property owned by them be applied to the payment of the debts owing by them in October previous, and that it should be divided ratably among their creditors.

The ground stated for such relief, was the purchase by Wilson & Co. of Paige & Co., of \$50,000 worth of goods; the embarrassment of the former in October, 1857; a request to them by the plaintiffs therein, and others, to extend their credit, which was complied with, such compliance being obtained by a representation by such defendants that such embarrassment was temporary, that they were solvent and able to pay all their creditors, and a promise by them to pay the plaintiffs in full, or as much as any other creditors; such complaint further alleged that other creditors had been paid in full. Such complaint was filed on behalf of the plaintiffs, and other creditors of Wilson & Co., who should elect to come in and contribute towards the expense of the action.

The supplemental complaint in this action was filed against the original defendants in such action and the present plaintiffs, as parties defendants therein, and judgment is thereby demanded; and that the assignment to the present plaintiffs should be set aside, the assigned property delivered to a receiver, and distributed among the creditors of L. O. Wilson & Co., and the defendants therein enjoined from disposing of any of the assigned property; the grounds for such relief are stated therein to be the assignment after notice of the injunction of the present plaintiffs, the indebtedness of L. O. Wilson & Co., in October previous, amounting to three millions of dollars, their payment of two millions of such debts, at the sacrifice of over half a million of dollars, in the loss on a sale of goods to raise such sum, and a breach of the condition of the extension, that all the creditors of L. O. Wilson & Co., would join in it. Nothing appears in such complaint, or in any paper used on the argument, as to the time of the service of the injunction.

The notices of the attachment by the sheriff did not create any claim for the debt demanded in the suit, as they did not operate as a levy or seizure by him, and he can only sue to recover debts seized or attached by him. (*Code*, § 237, subd. 4.)

The attachment is to be executed by leaving a certified copy of the warrant with the debtor, with a notice showing the property levied on (§ 235), and he is required to return an inventory, and keep the property seized by him, to answer any judgment. (§ 232.)

The warrant of attachment only authorizes him to attach and safely keep so much of the defendant's property, as may be sufficient to satisfy the plaintiff's demands, with costs and expenses (§ 231), his right is therefore not unlimited, to seize and attach all the defendant's property. The notices did not therefore comply with the statute, they did not show the property levied on, they did not describe it any way, to whom it was due, when and for what amount.

In *Orser v. Grossman* (4 *E. D. Smith*, 443; S. C., 11 *How. Pr.*, 520), it was strongly intimated that the notice of an attachment against all the property would not hold any, and it was expressly decided in *Kuhlman v. Orser* (5 *Duer*, 242), in this court, that it would not. The right to a discovery of the

nature and amount of the claim show the intent of the statute; the notices, therefore, gave no claim to the sheriff.

On the facts set forth in the original claim of Paige & Co., in the action against L. O. Wilson & Co., they were not judgment-creditors of the latter, and could not set aside their assignment for fraud; the promise by L. O. Wilson & Co., to pay them their extended notes, created no equitable lien upon their assets; any claim might render their extension void, but could go no further. There was no promise by L. O. Wilson & Co. to pay out of any specific fund, or appropriate it to the use of any other creditor.

The facts set forth in the supplemental complaint are equally ineffectual; they only claim the assignment to be void because made in violation of the injunction; that could not be so, as the only effect is to bring the violator in contempt, not the stranger to the suit. All the facts alleged in such action do not constitute any claim by the plaintiffs therein against the present defendants, and they therefore cannot be prejudiced thereby.

The notice of Paige & Co. is not broader than the action; they admit in it that the assignment is good, but claim it to be subordinate to their own lien. The claim of themselves and the sheriff, alleged in the affidavit of the defendants is not supported by any facts alleged, and, therefore, is no better than a mere bald claim to the money. The prayer in the action of Paige & Co., to remove the present plaintiffs as trustees, is in support of the assignment.

The affidavit, however, on which the motion was founded, does not allege as facts any of those on which the claim of Paige & Co. rests, or that the applicant is ignorant of them, or that he does not know to whom he can safely pay the amount claimed, which was essentially necessary formerly in a bill of interpleader. (2 *Barb. Ch. Pr.*, 573; *Bell v. Hunt*, 3 *Id.*, 391.) And it is settled that section 122 only changes the mode of relief. (*Sherman v. Partridge*, 1 *Abbotts' Pr.*, 260; 11 *How. Pr.*, 154; *Duer*, 646.)

The rule is laid down in *Shaw v. Coster* (8 *Paige*, 347, 338), that the party applying for relief must show that he is ignorant of the rights of the respective parties who are called upon by him to interplead, or, at least, that there is some doubt upon

some point of fact to which claimant the debt is due, so that it cannot safely be paid to either.

The facts on which the parties' claim in this case rests, are all known, and furnish no ground for believing that one set of parties' have any, and there is no reason why the action should be interfered with.

The order also seems one from which an appeal can be taken; it affects a substantial right, the reasoning in *St. John v. Croel* (10 *How. Pr.*, 253), as to the continuance of an action in the name of a surviving plaintiff, or of the representation of a deceased plaintiff, is equally applicable; the plaintiff should not be obliged to contend with parties not shown to have any interest, but who might embarrass him with a frivolous defence.

The objection that the order now appealed from was not the subject of an appeal cannot be sustained. The discretion mentioned in section 122 is not such as to make the order unappealable; the only object was to give the court discretion beyond the facts required to be stated in the affidavit, without which the court had not jurisdiction to make the order, but that discretion must be regulated by the rules of law adopted in regard to bills of interpleader; the right affected is substantially within the meaning of subdivision 3 of section 349; it clearly would have been so if the relief asked for had been refused in a proper case, and the plaintiffs are equally clearly affected in a substantial right when their past dues are subjugated to the costs of a litigation and commissions on the moneys paid in and out of the hands of a depository.

A refusal to allow an action to be continued in the name of a surviving plaintiff, or the names of the representatives of a deceased plaintiff, although a new action might have been brought by them, was held to affect a substantial right. (*St. John v. Croel*, 10 *How. Pr.*, 253.) The substitution of new defendants, perhaps of not equal solvency with the original parties, appears to me equally to do so.

The order appealed from must be reversed, with ten dollars costs of the appeal, to abide the event of the suit.

DEMAREST *v.* DAIG.*New York Common Pleas ; General Term, July, 1860.*

RES ADJUDICATA.

The decision of a referee on a question within the power of the court to direct to be determined by a reference, and which might be reviewed by appeal,—*i. g.*, on a question of the settlement of the accounts of a receiver,—is a determination, which, when made an order of the court, is conclusive on the parties *as res adjudicata*.

Appeal from a judgment.

The facts are fully stated in the opinion.

BY THE COURT.—HILTON, J.—John Daig, the husband of the defendant, died intestate, in October, 1846, and in the same year the defendant was appointed by the surrogate of the county of New York, administratrix of his goods, chattels, and effects. Among the property to be administered, was a household estate, which in January, 1847, she sold to Ira Burge, receiving from him in part payment, his note for \$2,500. In March following, and before the note was paid, an action was brought in the Supreme Court, by John P. Demarest and wife, against the defendant and others, for the purpose of establishing an alleged will of John Daig, and in this suit an injunction was granted, restraining the defendant from intermeddling as administratrix or otherwise, with the estate or effects. Pending the suit, Thomas J. Coleman was appointed receiver of the rents and profits of the property of the deceased, and in addition was, in December, 1851, appointed special receiver of the Burge note then held by the defendant, but which on his appointment, was by her delivered over to him, and he afterwards was paid the amount of it, which, with interest, was on February 25, 1852, \$2,808.13. In June following, the Supreme Court decreed, upon a hearing, a dismissal of the complaint in the

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action thus commenced, and dissolved the injunction as granted; whereupon the defendant was reappointed by the surrogate, administratrix of the estate, &c., of John Daig, and entitled as such to the proceeds of the Burge note. In March, 1853, the defendant and Coleman had a settlement respecting their proceeds, by which the defendant received three coal-bonds for \$2,500 of the Chartrer's Coal Company, in which, it was claimed by Coleman, the money had been invested; and a check for a difference or balance of about \$153. At this time, the defendant gave the receipt and guaranty, upon which suit is now brought, and by which she acknowledged receiving the bonds and difference mentioned, in full settlement of her claim against Coleman as special receiver in respect to the Burge note, and discharged him from all liability therefor; and further, she assumed the responsibility of accounting to all persons interested in the estate of John Daig, deceased, and agreed to save Coleman and his heirs harmless therefrom—the instrument concluding with the assertion that as administratrix, she, the defendant, had full power to make such settlement.

In May, 1854, several of the parties to the suit thus dismissed, upon a petition and notice of presentation thereof, duly served on Coleman, applied to the court for an order requiring him to render an account of his proceedings as trustee and receiver of the rents and profits, and also as special receiver of the proceeds of the Burge note; and upon the amount in his hands being ascertained, that he pay it over to be distributed by the court among those entitled to it. It seems that there was no opposition to this application, and accordingly an order of reference was made on May 12, 1854, by the court to Dayton Hobart, Esq., to take and possess the accounts of Coleman, and upon a settlement thereof, and the accounts in his hands being ascertained, directing that he pay it into the hands of the referee, to be distributed among the parties entitled to it. And furthermore, it was provided that upon such reference, Coleman or any of the parties to this suit were at liberty to summon before the referee all persons interested in the accounts, so that the same might be *finally settled*.

Before, as it seems, any proceedings were had under this order, and while the defendant, Mrs. Daig, was ignorant of its

having been granted, she caused an application to be made to the court for an order requiring Coleman to account respecting the Burge note. The petition upon which this application was based, and which was, with notice of the intended motion to the court, presented and duly served on Coleman, stated that as administratrix of John Daig, deceased, she had rendered to the surrogate a full account of her proceedings, and been fully discharged, except as to the proceeds of the Burge note, and as to which Coleman had in no way accounted, except for a small sum, which was, as before stated, promised her in cash—and as to the three coal-bonds delivered to her in settlement, that they were imposed upon her by fraud and misrepresentation on the part of Coleman, were of no value, and that instead of the moneys having been by him invested in them, at or about the time of its receipt, as he had represented to her, that the money, as she believed, had been used by him in his business, and the bonds had been procured afterwards for a nominal sum, and were worthless.

On the hearing of this application Coleman appeared, denied under oath all the fraud and deception charged against him, and alleged that the investment in the coal-bonds had been made in good faith, and at Mrs. Daig's request. That as such receiver he had settled with her as administratrix,—taken from her an indemnity against further accounting, and therefore was fully discharged from the trust respecting the Burge note. He concluded his answer to the petition by asking for its dismissal, with costs. After hearing the parties, the court referred it to Theodore Sedgwick, referee, to take testimony upon all the issues involved in the petition and the accompanying papers, and report the same to the court, reserving all questions until the coming in of the cause, when the matter might be brought up by motion of either party.

Subsequently, the defendant having been notified of the reference to Hobart, appeared therein. During its progress Coleman insisted that he should only be called upon to vouch for the moneys received by him from the real estate of John Daig, deceased, excluding the Burge note; but the referee decided otherwise, and held that under the order of reference he was required to report the accounts in respect to each, both as to the note and real estate. Shortly after this decision, Coleman

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applied to the court to have the accounts in respect to the Burge note continued under the order of Referee Sedgwick, and withdrawn from the consideration of Mr. Hobart, under the order of reference to him. The court, after hearing counsel for all the parties interested, denied this application, and directed that the reference to Mr. Sedgwick, and the order and proceedings thereon be revoked and discharged, and Mr. Hobart was directed to fully execute the order of May 12, 1854, and Coleman was directed to account for the proceeds of the Burge note, and all other matters as in the order provided. The effect of this direction was to engraft upon the reference to Hobart the issue presented by the petition of Mrs. Daig, and the answer of Coleman to it, which had been originally referred to Mr. Sedgwick to take process in respect to.

When the parties next appeared before Mr. Hobart, upon the reference thus consolidated, counsel for Mrs. Daig tendered to Coleman the three coal-bonds, and thereafter testimony was given respecting their value and character, and as to the transactions referred to in the petition of Mrs. Daig and Coleman's answer to it.

At the close of the reference, the referee determined in favor of the claim of Mrs. Daig, by finding that Coleman had been shown to have received the proceeds of the Burge note, but had not shown any legal or valid payment thereof, and thereupon, the referee proceeded to and did determine the rights and interests of all parties to the moneys ascertained by him to be remaining in Coleman's hands.

Notice of the motion for confirmation of this report having been given to Coleman, his counsel attended and opposed, upon the ground that the referee erred in charging Coleman with the Burge note, the same being personal property, and having been paid over to the administratrix; also, that he erred in excluding testimony offered upon the reference to show that Coleman had been discharged from the payment of the proceeds of the note of Burge; and, finally, that it was clearly proved that Coleman had paid the administratrix the moneys collected on the note, while, if the report was adopted, she would be entitled to receive one-half of the money over again. The court, on June 30, 1860, confirmed this report and decision, after allowing a credit of about \$300 in addition to those allowed by

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the referee, and, therefore, an order was made directing the payment and distribution of the proceeds of the Burge note, then amounting to \$3,015.07, among the parties appearing entitled to it. Subsequently, Coleman failing to make the payment as directed by the last-mentioned order, the court awarded an attachment as for a contempt against him, unless he paid as directed forthwith; and in respect to the distributive share of such moneys belonging to Mrs. Daig, he was directed to pay it into the United States Trust Company, to abide the result of any action in respect to it, which might be commenced within thirty days thereafter, without, however, by such direction, intending to adjudicate upon the rights of Coleman and Mrs. Daig in any respect.

That action thus foreshadowed has been brought by the present plaintiff upon the receipt and guaranty of Mrs. Daig, so given by her at the time of the alleged settlement between Coleman and her on March 10, 1856; the plaintiff as assignee having surrendered to any rights of Coleman upon the instrument which forms the subject of this suit. The defence here is substantially a reiteration of the fraud and deception alleged in the petition of Mrs. Daig before referred to, and a general statement of the proceedings here narrated, claiming that by these the rights of Coleman and herself respecting such receipt and guaranty, and the proceeds of the Burge note had been therein finally adjudicated and determined. surrendered!

At the trial of this case these facts substantially appeared from the records, original orders, and proceedings produced from the files of the Supreme Court, and by which it was claimed that the defence of *res adjudicata* was established. The judge so held, and the plaintiff having appealed, that may be regarded as the only material question submitted for our reverse and decision, although it was urged on the argument that some of the evidence admitted, notwithstanding the plaintiff's objection and subsequent exception, was incompetent and should have been rejected; such as the minutes of Mr. Hobart, the referee, of the proceedings and evidence before him, also copies of points used on the arguments had before the Supreme Court. There can be no doubt that these papers were improperly allowed in evidence, and if the facts stated were in any respect, so far as they are material upon the question before us, gathered from

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them, we would feel called upon to reverse the judgment as being grounded upon incompetent testimony. (1 *Phillips on Ev.*, 4th Am. ed., 400, and note; 1 *Greenl. Ev.*, 166.) But as the motion-papers, orders, reports, and documents referred to forming the judicial proceedings in the Supreme Court respecting the subject of the present controversy, and properly allowed to be read at the trial (*Van Rensselaer a. Akim*, 22 *Wend.*, 549; 1 *Greenl. Ev.*, 86), furnish proof of all the material facts in the case, the papers thus improperly admitted may be considered by us as cumulative in some degree, and therefore should be regarded as immaterial matter, in no way affecting the result arrived at by the judge at the trial. (*Benjamin a. Smith*, 12 *Wend.*, 404; *Smith a. Kerr*, 1 *Barb.*, 155.)

A brief review of the proceedings which were instituted to call Coleman to account for the moneys which had come to his hands as special receiver, may be useful to illustrate the conclusion to which these facts necessarily lead us.

There can exist no doubt as to the power of a court of equity, of its own motion and at any time, to call upon a receiver appointed by it for an account of the money or property which has come to his hands, and to direct its distribution among the parties appearing entitled to it. The usual course, however, is for the court to await the action of those interested; and so it was in this instance. The suit in which Coleman was appointed having terminated, some of the parties to it, in conformity with the settled practice in such cases, applied to the court for the usual reference to pass and audit the receiver's accounts. The order upon this application having been made without the knowledge of Mrs. Daig, who as administratrix was the only person entitled to receive the proceeds of the Burge note, owing to the fact that it was part of her husband's estate, which came to her for distribution in due course of administration (2 *Rev. Stat.*, 82, § 6; *Id.*, 113, § 3), she subsequently presented her petition to the court, setting forth the pretended settlement of Coleman, and upon which he procured the receipt and guaranty which forms the basis of the present action. She alleged that it was procured from her by fraud and misrepresentation, and should not, therefore, be regarded as a bar to his being required by the court to account for and pay over to her, as administratrix, the moneys which had come to his hands as re-

ceiver. To this petition he answered by an affidavit denying the fraud charged, and claiming that he had paid over to her all the money he had received, and asked that he be discharged from any accounting in the matter. Thus an issue of fact was presented to the court for adjudication in the only way that the official position of Coleman would permit such an issue to be raised; and there can be no doubt that it was perfectly competent for the court, at the time of the hearing upon this petition, to determine the question there presented, and to declare whether the receipt and guaranty was entitled to the weight which Coleman claimed for it, or whether by reason of the alleged fraud and misrepresentation it was to be considered as absolutely void and of no obligatory force; and in case the latter view had then been adopted, and the court had ordered Coleman to pay the proceeds of the Burge note to Mrs. Daig, as administratrix, I think the learned counsel for the plaintiff here would not for a moment contend that such a decision would not be a final adjudication upon the question.

It certainly would make no difference whether the judgment or determination was in a common-law action, or in a proceeding which by the ordinary practice of courts of equity is of a summary character; but, as was said by EDMONDS, J., in *White v. Coatsworth* (2 *Seld.*, 143): "It is enough that the question has been submitted to a judicial officer to be determined in a judicial way, that the parties and their proofs have been heard, and their rights settled by a judicial determination. When this has been done it is conclusive upon the parties until reversed, vacated, or set aside in the forms prescribed by law." And it seems that this rule has been carried so far, that it has been applied to the taxation of costs, which though not technically a judgment, yet is a judicial act—a duty confided to judicial officers, to be exercised in a judicial manner, and by which parties to the proceeding are concluded. (*Supervisors of Onondaga v. Briggs*, 2 *Den.*, 33.)

But it can be said that the court did not so determine on the hearing of the petition; yet the course adopted amounted to the same thing in effect. Instead of determining the question on the spot upon the proofs which the parties then offered, the usual reference was ordered to take testimony, and this direction was subsequently engrafted upon the original reference

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granted in the first instance. The referee was thus substituted for the judge, and his decision was equally binding; and even if it were not, the action of the court afterwards upon exceptions by Coleman to his report when this identical question first raised by the petition was again presented, and the court affirmed his judgment, thus in effect declared that the receipt and guaranty now sued on was procured by fraud, as Mrs. Daig had in her petition alleged. The order then entered, having, as we have seen, been made in a summary application in an action after judgment, was subject to appeal as a matter of right (*Kirby a. Fitzpatrick*, 18 *N. Y.*, 484), and might, as a final determination affecting a substantial right, have been brought ultimately for review before the Court of Appeals. (*Code*, § 349, subd. 5; § 11, subd. 3.) It therefore comes within the class of adjudications to which the doctrine of *res adjudicata* is applicable, and Coleman by not appealing and procuring its reversal is concluded by it. To hold otherwise would in our opinion be disregarding a salutary rule of law by which parties are prevented from litigating over again, at the pleasure of either, matters which have been once solemnly determined by a judicial tribunal. (*Outram a. Morewood*, 3 *East*, 346; *Gardner a. Buckbee*, 3 *Cow.*, 120; *Butt a. Sternburgh*, 4 *Ib.*, 559; *Wood a. Jackson*, 8 *Wend.*, 9; *Miller a. Manier*, 6 *Hill*, 121; *Bouchaud a. Dias*, 3 *Den.*, 238; *Bangs a. Strong*, 10 *Paige*, 11; *Doty a. Brown*, 4 *Comst.*, 71; *Birckhead a. Brown*, 5 *Sandf.*, 134; *Davis a. Talcott*, 2 *Kern.*, 184; *Castle a. Noyes*, 4 *Ib.*, 329.)

Judgment affirmed.

THE PEOPLE AND PLATT *a.* STOUT.*Supreme Court, First District ; Special Term, May, 1860.**Again, General Term, June, 1860.*

MANDAMUS.—QUO WARRANTO.—REMOVAL OF OFFICER.

Mandamus granted to compel the approval of official bonds, in order to enable the appointee to bring an action to try the title to the office.

The power to remove an officer for cause is of a discretionary or judicial nature, and, unless otherwise specially provided by law, is not the subject of examination or review by any other tribunal than the one in which the power is vested, either in respect to the cause, or in respect to its sufficiency, or existence, or in any respect whatever.

Mandamus, and action in the nature of *quo warranto*.

The mayor of the city of New York with the consent of a majority of the Board of Aldermen, removed the defendant from the office of city chamberlain, and appointed Mr. Platt, the plaintiff, in his stead. The latter applied to the comptroller to approve the bonds required by law to be given by him ; but the comptroller declined to do so on the ground that the alleged removal was ineffectual, or that he had had no sufficient evidence of the new appointment.

I. *May, 1860.*—Application for *mandamus*.

Mr. Platt now applied by counsel for a mandamus, requiring the comptroller to approve the bonds.

David Dudley Field and *R. W. Martin*, for the relator.

Wm. M. Evarts, for the comptroller.

James T. Brady and *A. R. Lawrence*, for Mr. Stout.

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MULLEN, J.—The counsel for Mr. Platt insists that the bond required to be filed before he (Platt) can enter on the duties of the office of chamberlain, to which he claims to have been duly appointed, must be approved within fifteen days from the day on which he is notified of his appointment. The fifteen days expire to-day, so that scarce an hour is allowed to examine the numerous and important questions involved in the case. All I can do is to declare the conclusions at which I have arrived, without examination or reflection, except what I have been able to give it during the argument. I think the counsel is mistaken when he insists that the bond may not be approved and filed after to-day.

But should I be mistaken in this, and the omission to have it approved and filed should work a forfeiture of the office, great injustice will be done to Mr. Platt. He has a right to have his title to the office tried, and this he cannot have done if the omission to file makes a forfeiture. Mr. Platt presents, I think, a *prima-facie* right to his office. The statute does not seem to require *cause* to be shown for the removal of the chamberlain, by the mayor, with the consent of the Board of Aldermen. If not, then a vacancy had occurred, and the appointment of Platt was regular, unless the meeting of the Board of Aldermen was irregular. As to that, I entertain very serious doubts. But as that question will arise on the trial of the right, I will not dwell upon it.

The approval of the bond may produce confusion in the financial operations of the city; but I cannot allow that difficulty to control the decision.

To refuse the mandamus may be to deprive Mr. Platt of the office altogether, and that result ought not to be brought about unless demanded by the most imperious necessity. To allow the mandamus will deprive Mr. Stout of no rights, while to refuse it may work irremediable injury to the other party.

The writ of peremptory mandamus must therefore issue.

II. June, 1860.—*Quo warranto*.

The relator now brought an action in the nature of *quo warranto*, to try the title to the office. Judgment for the defendant was entered *pro forma* at special term, and the plaintiffs ap-

pealed. The facts are fully stated in the opinions of the court.

David Dudley Field, for the appellants.

Wm. Curtis Noyes and *James T. Brady*, for the respondent.

LEONARD, J.—This is an action in the nature of a *quo warranto*, to oust and exclude Mr. Stout from the office of chamberlain of the city of New York, which it is alleged, he withholds after removal by lawful authority, from Mr. Platt, who has been legally appointed, and has duly qualified.

The cause assigned for the removal of Mr. Stout was, that he had refused to pay interest on the funds of the city, in his hands by virtue of his office.

The mode of removal was by the mayor, with the consent of a majority of the Board of Aldermen.

Mr. Stout insists that he was not required to pay interest by the ordinances; that he was never notified of any charge against him in his official capacity; that no opportunity was afforded him to be heard in his defence; and that his removal was, in fact, without any legal cause, and is for these reasons wholly ineffectual for the purpose intended.

These questions come up on demurrer to the defendant's answer, and the pleadings are so arranged that every allegation of fact on either side is admitted.

The right of removal, except for legal and sufficient cause, whether such cause, in fact, existed at the time of the removal, and was assigned therefor, and the authority of the court to examine into or consider the manner in which the power of removal by the mayor and aldermen has been exercised, are questions that have been argued before us with great learning and ability, and which we are now to decide.

We have given to this case all the time and examination which the brief interval since the argument, and other daily engagements have permitted, and we are now prepared to announce our decision, as we think correctly; we shall, however, necessarily omit any extended discussion or review of the subject.

The city charter, passed in 1857, provides (§ 19) that the heads of departments shall be appointed by the mayor, with

the advice and consent of the Board of Aldermen. Section 21 provides, that the mayor shall have the power to suspend, for cause, during any recess of the Common Council, and, by and with the consent of the Board of Aldermen, to remove any of the heads of departments, except the comptroller and counsel to the corporation. * * * * That the Board of Aldermen shall have power, without the consent of the mayor, by a vote of two-thirds of all the members elected, to remove any of the heads of departments, for cause, except the comptroller and counsel to the corporation. * * * * That the chamberlain shall be appointed by the mayor, with the consent of the Board of Aldermen, *and may be removed in the same manner with the heads of departments.*

Referring to the debates in the conventions which framed the constitutions of 1821 and of 1846, we find that where the power of removal has been conferred, for causes to be publicly assigned by those in whom the power has been vested, that the responsibility to the people, it was considered, would be a sufficient guard against an improper exercise of this power. It appears not to have been contemplated that any review should be had of its exercise.

We have examined, with considerable care, to find any adjudicated case where the courts have exercised the power to review the removal of an officer in a case where the right to remove was vested, by legislative or constitutional enactment, in a particular person or body, for cause or upon notice to the incumbent, but have been unable to meet with such a case.

The mayor and the Board of Aldermen were not acting in a ministerial capacity in performing the act here complained of.

The cases are numerous which hold, that where a discretion is vested in any inferior jurisdiction, and that discretion has been exercised, a mandamus will not be granted, because the court cannot control, and ought not to coerce, that discretion.

The application of the principles decided in analogous cases arising on mandamus, are, as I conceive, in point here. The remedy by mandamus is not the proper one here, because Mr. Stout is now in office by color of right (*People v. Corporation of New York*, 3 *Johns. Cas.*, 79); but that does not afford any

reason why the principles decided in cases arising on mandamus are not good as authority in actions of *quo warranto*, if analogous. (People *a. Supervisors*, 12 *How. Pr.*, 204.)

The supervisors were authorized by law "to examine, settle, and allow, all accounts against their respective counties." They disallowed a part of the demand of the relator (who was a marshal for taking the census), after having audited the account. The court held, that the law conferred on the supervisors the exercise of judicial functions, and that it was not reviewable by mandamus. (People *on rel. Peabody a. Attorney-General*, 13 *How. Pr. R.*, 179.)

The Code (§ 432) makes it the duty of the attorney-general to determine whether, in any particular case, it is proper that an action should be brought to try the right of any claimant to an office. The court refused a mandamus, because the exercise of discretion, under that section, by the attorney-general was, in its nature, a judicial act, from which there was no appeal, and over which courts have no control. (Waddell *a. The Mayor, &c.*, 8 *Barb.*, 95.)

The charter of the city of New York authorized the Common Council to alter or amend the grade of the streets. It was decided that it was not the province of the Supreme Court, to review the judgment of the Common Council, or examine into their motives. (*Exp. Johnson*, 3 *Cow.*, 381.) This was an application to the City Court to remove a justice of the peace for making a false return to a certiorari, and for keeping his office in a grog-shop. The authority to remove justices of the peace was vested by the Constitution in the County Court, for causes to be particularly assigned by the judges of that court, and after notice to the party complained of, and an opportunity of being heard in his defence. The County Court denied the application, without reference to the merits; and, in substance, refused to consider the subject at all.

An application was made to the Supreme Court for a mandamus to compel the County Court to take cognizance of the matter.

The Supreme Court decided that the County Court held a constitutional power, with which they would not interfere. That the County Court were the sole judges whether they would notice the charges or not.

In Judges of the Oneida Common Pleas v. The People, &c. (18 Wend., 79), the Court of Common Pleas certified that the title to land came in question in the trial of a cause which carried costs against the defendant, although the recovery was under fifty dollars. The defendant in that action applied to the Supreme Court for a mandamus, directing the Common Pleas to vacate the order granting costs. The Supreme Court examined the facts, and declared that the title to land did not come in question, and awarded the mandamus. The question was carried before the late Court of Errors. The facts were so clear that it seemed indisputable that the Common Pleas had shown an arbitrary partiality. The Court of Errors decided unanimously (twenty-two members present), that the granting or withholding of the certificate was in the discretion of the Common Pleas, the authority being conferred on them by statute so to do, and that the Supreme Court had no jurisdiction to review the decision of the court below, certifying that the title to land come in question on the trial. This was a case where the certificate was wholly unfounded in fact.

Numerous other cases are referred to, in the various authorities above cited, and also in the authorities referred to on the points of counsel for the appellants, establishing conclusively that where a particular discretion or authority of a judicial nature has been conferred on an inferior jurisdiction by statute, the exercise of that authority cannot be reviewed in any respect, and the judgment which such jurisdiction may render is conclusive, unless the right of appeal or review has been expressly given by law.

The authorities cited from English reports, by the counsel for the respondent, have also been carefully examined, and without here reviewing them in detail, it is sufficient to say that the authority to remove officers by the various corporations by which the power was exercised was derived from custom, prescription, or as an incidental power, and in many instances, where the incumbent had a freehold interest in the office. The existence of the right to make the removal at all, was in many cases a fact necessary to be ascertained; and if the right existed, then, in many cases, to ascertain whether it had been exercised in accordance with the custom.

Where the right has been so derived, the question involved

is obviously one of fact, and the exercise of the right of removal was a ministerial power, and therefore subject to judicial review in the courts, where issues for trial can be framed, and evidence produced and examined.

From our examination of the case, without further reference to the language of the section of the statute from which the power of removal in this case is derived, we hold that the authority of removal is conferred by law upon the mayor and a majority of the Board of Aldermen, and that the exercise of this authority is of a discretionary or judicial nature, and is not the subject of examination or review by any other tribunal, either in respect to the cause, or its sufficiency, or existence, or in any respect whatever.

There must be some termination to the exercise of discretion; and it does not appear, as a principle, to be an unreasonable or extraordinary thing for the Legislature to have conferred such discretion upon the mayor and a majority of the Board of Aldermen.

If the courts are to control the exercise of the power of removal in such case, then the removal is not by the mayor with the consent of a majority of the Board of Aldermen, but the consent of the judges of the Supreme Court must also be obtained, where the parties interested choose to invoke the action of the court.

We have also been referred to an act of the Legislature, passed April 7, 1860, directing the deposit of the public moneys by the chamberlain, and, as we think, limiting the period of the termination of his office, but not affecting the tenure of it, except in case the power of removal shall not have been exercised. The power of removal remains unaffected by the act.

The judgment of the special term, upholding the right of the defendant to the office of chamberlain, must be reversed, and judgment must be entered for the plaintiffs according to the prayer of the complaint.

SUTHERLAND, J.—This is an action in the nature of *quo warranto*, in which the plaintiff, Mr. Platt, claims that he is entitled to the office of chamberlain of this city, that he ought to be put into it, that the defendant, Mr. Stout, is not entitled to it, and that he ought to be ousted. The complaint states

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various facts to show Mr. Platt's title to the office, and to show that Mr. Stout had been legally and duly removed from the office. The answer states various facts to show that Stout had not been legally removed. The plaintiff demurs to this answer.

The questions are as to the title of Mr. Platt to the office, his right to be put into it, and whether Mr. Stout has been legally and duly removed from it. It is conceded, and no question is made, that if Mr. Stout has been duly and legally removed, Mr. Platt has been duly and legally appointed. So that the only question in the case is as to the legality of the removal on the facts presented by the demurrer. Judgment *pro forma* at special term, was entered in favor of Mr. Stout on this demurrer. The court are unanimously of opinion that the judgment at special term for the defendant on the demurrer must be reversed, and that the plaintiff should have judgment on the demurrer, and that the said Platt is entitled to the said office, and that he be admitted to the same, and that the said defendant is not entitled to the same.

The grounds of this decision are briefly these: The main and important question is whether this court has any jurisdiction over, or right to control the exercise of the power of removal vested by section 21 of the charter of 1857 in the mayor and the Board of Aldermen, or in the Board of Aldermen, by a two-thirds vote of all the members elected; or whether the Legislature by the charter intended to vest in the mayor and Board of Aldermen, or in the Board of Aldermen alone by a two-thirds vote, the *discretionary* power of removal? If the right and power of removal is discretionary, this court has no jurisdiction over, or right or power to control, its exercise—except to see that it has been exercised in the form prescribed by the law creating and vesting the power. It may be laid down as a general proposition,—abundantly supported by authority, and as the result of our political or governmental institutions, which operate by a delegation of political or governmental powers to various tribunals, officers, and agents,—that when the Constitution, or the Legislature by law authorized by the Constitution, vests a discretionary or judicial power in any particular inferior tribunal or officer, that this court has no other or further jurisdiction or control over the exercise of such power by

such inferior tribunal or officer, than to see that such inferior tribunal or officer, on the occasion of its exercise, had jurisdiction over the subject-matter of its exercise,—that is, that the occasion or circumstances, contemplated by the Constitution or the act, for its exercise had occurred,—and that the power has been exercised in the form prescribed by the Constitution or the act.

The case *Ex parte Johnson* (3 *Cow.*, 371), may be referred to, to illustrate what we mean. In that case, by the Constitution of 1821, the County Court had power to remove any justice of the peace for cause to be assigned by said court, such justice having a copy of the charges served upon him and an opportunity to answer. One P. B. Johnson presented a verified petition to the County Court, stating that a certain justice of the peace, had made a false return to a certiorari, wilfully and knowingly, and also held his court in a grog-shop or a drinking-shop, an improper place, and asked for the removal of the justice. The County Court refused to consider the question, and an application was made to the Supreme Court for a mandamus; and the court say that the Constitution vests in the County Court discretionary power over the whole subject, and had made them the sole judges, whether they should listen to the charges preferred. The court say, We will not interfere in any manner; we have no right to interfere. A case, not cited, I believe, by either of the counsel on the argument, *Commonwealth v. Pike Beneficial Society* (8 *Watts & Sergeant's Penn. R.*, 247), may be referred to as explaining the grounds upon which we rest our decision.

Now, whether any power not thus expressly given by the Constitution or by the Legislature, but judicially inferred or determined as existing, as a mere incident of the powers expressly conferred, can be called or considered a discretionary power, we are not called upon to decide. The power granted here is express. The cases cited by the counsel for the defendant, are most of them cases where this power has been inferred. No case has been cited to show that such a power expressly given, was not discretionary. Now, with regard to this incidental power, we make this suggestion: Would the courts ever infer or imply a power which they could not direct or control? The very fact that the courts would imply the

power, would appear to imply that they would and must direct it. Will the court imply discretionary power not subject to its direction and control?

Now, the question in this case arises on section 21 of the charter of 1857. If I understand my associates, and I believe I do upon this point, we think it is not necessary to pass upon the question whether the words "for cause" in the section granting the power to the mayor to suspend, and with the consent of the Board of Aldermen to remove, qualify merely the power to suspend, or qualify also, the power to remove. Concede that they so qualify the whole, so that it shall read, "that the mayor shall have power to suspend for cause, and by and with the consent of the Board of Aldermen to remove for cause;" concede that to be the language, the cause not being defined or designated, by the statute, the whole subject is left to the discretion of the mayor and the Board of Aldermen, except in this, that we are judicially to determine whether the Board of Aldermen have consented; that of course, is a judicial question. Perhaps we may say the exercise of the power is, so far, the subject of judicial review, as that a cause or some cause must or should be assigned for the exercise of the power. We might go so far as to say that this court should see that they assign a cause. But in this case, we have no control, nor can we adjudicate upon the sufficiency or goodness of the cause, because the statute does not designate any cause, and there is no standard, or rule, or definition, by or according to which one can determine the assigned cause to be good or sufficient. The construction which would give us the power to judge the goodness or sufficiency of the cause assigned, in the absence of any specification by the Legislature, would virtually give to this court the power of removal, and the Legislature will have committed it in effect, not to the mayor and aldermen, but to the Supreme Court. A discretionary power which can be controlled by the court is virtually given to the court, because the parties interested may always resort to the court. If this statute had said that the mayor and the Board of Aldermen might remove for dereliction of official duty, then they could adjudicate upon the question whether the chamberlain was removed for that cause. We may even go so far as to say, if the law had been that he should continue in office during good be-

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havior, and should be removed for misbehavior, that it must be a question whether the removal was for misbehavior within the meaning of the act. But this statute says for cause, without the designation or specification of any cause whatever. The result must be that the Legislature intended by the act to give, so far as it regards the sufficiency, or goodness, or reasonableness of the cause, the whole discretionary power to the mayor and Board of Aldermen, or to the Board of Aldermen acting by a two-thirds vote, to determine and adjudicate for themselves on those subjects, in view of their responsibility to the public. The question whether the Board of Aldermen did in fact consent to the removal of the defendant is properly before us, and is one which we have a right to determine? That depends upon the question raised in the case, whether the Board of Aldermen, subsequent to the abdication of the chair by Mr. Boole, was properly in session so as to pass the resolution? That applies only to the meeting of the 14th of May, when the resolution was first passed. The court are of opinion that this abdication of the chair by Mr. Boole did not deprive the Board of Aldermen of the right to appoint another chairman. It is hardly necessary to decide even that, because afterwards, on the 31st of May, the Board did pass a resolution referring to the action of the 14th of May, and to the doubts which had arisen as to whether the Board had then been properly organized, and reaffirming the resolution, and concurring in the removal of Mr. Stout and the appointment of Mr. Platt.

The result is that the judgment must be reversed, as I have stated.

BOOKER, J., concurred.

Judgment reversed.*

* The defendant did not further contest the question.

HOWE v. SEARING.

New York Superior Court; Special Term, July, 1860.

STAY OF PROCEEDINGS.

Though after judgment enjoining defendant, and pending his appeal therefrom, he acts at his peril in disregarding the injunction, yet if by giving proper security on the appeal, he has stayed plaintiff's "proceedings on the judgment," the court will not, pending such appeal, allow an attachment against him for contempt in disregarding the injunction. Such an attachment would be a proceeding on the judgment.

Motion for an attachment.

The action was brought to restrain defendant from infringing plaintiff's trade-marks or name. Plaintiff recovered judgment, which was affirmed at general term, 10 *Ante*, 264; and defendant appealed to the Court of Appeals, and gave security to stay plaintiff's proceedings. Meanwhile he continued his use of the trade-mark or name; and plaintiff now moved for an attachment for contempt.

WOODRUFF, J.—The judgment in this action in terms enjoined and restrained the defendant from using the name of the plaintiff, "Howe," or "Howes," in connection with the business of baking, or as descriptive of the bakery establishment kept by the defendant, or upon the signs or wagons, tickets or bills, used by the defendant; and the said judgment required the defendant forthwith to cause the word "Howe," or "Howes," to be stricken out and erased from any sign on the premises by the defendant, and from any wagon or wagons used by him, and awarded to the plaintiff his costs of suit.

The judgment so rendered being entered, was duly served on the defendant personally; and within the period allowed, therefor, he appealed to the general term of this court, by whom the judgment was affirmed, and the judgment of affirmance was duly served on the defendant personally. Thereupon

the said defendant appealed to the Court of Appeals from the judgment, and the undertaking required to render such appeal a stay of proceedings, by sections 334 and 342 of the Code, was executed and filed.

The plaintiff now moves for an attachment to punish the defendant for a contempt in not obeying the judgment, upon proof that he still continues to use the name of "Howe" and "Howes" on his signs and otherwise, as descriptive of his baking establishment, and upon the signs and wagons used by him, and has not discontinued the use of those names, but continues to use them, and by other means to hold out to the public that the establishment of the defendant is kept and superintended by the plaintiff.

By the express terms of section 342 of the Code, the perfecting of an appeal (in cases not provided for in certain specified sections which do not include the present case) by giving the undertaking mentioned in section 334, shall stay all proceedings in the court below upon the judgment appealed from.

If, therefore, this motion is a proceeding "upon the judgment," the motion is improperly and irregularly made; for as to all such proceedings the plaintiff's hands are tied. And if an attachment and a commitment thereunder for disobeying the judgment appealed from while the appeal is pending, are "proceedings upon the judgment," then the motion, therefore, cannot be granted; for not only the action of the plaintiff, but the action of the court therein, is stayed pending the appeal.

The title of the plaintiff rests on the judgment, and upon that alone. I do not know of any general expression, therefore, which would more plainly include the present application than that which is used in the Code as well as in the Revised Statutes, by both of which "all proceedings in the court below upon the judgment appealed from are stayed."

I think, therefore, that no present proceedings can be taken to punish the defendant for violating the judgment pending the appeal.

It is plausibly suggested that if the defendant, pending the appeal, continue to use the plaintiff's name, the relief which at the end of the litigation he may obtain will be of no value. That the use of his name and reputation by the plaintiff during that time will destroy the whole object and purpose of the suit.

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But the answer is equally plausible, if the defendant does obey the judgment of the court pending the appeal, discontinuing the use of the plaintiff's name, which he claims the right to use as an aid to his business and the good-will which he purchased, such a discontinuance will destroy the whole value of the right he claims; at the termination of the appeal, two or three years hence, he cannot regain the advantage which he now has in the use of the name.

Neither of these considerations can prevail in favor of either party. The plaintiff has established his right to enjoin and restrain the defendant. He has judgment, therefore, and has placed the defendant under injunction.

The defendant acts at his peril in disregarding the judgment.

But pending the appeal, proceedings against the defendant for contempt in such disobedience, are proceedings on the judgment, which cannot be prosecuted.

Motion denied.

RICHARDS *a.* THE NORTHWEST DUTCH CHURCH.

Supreme Court, First District; Special Term, April, 1854.

INJUNCTION.—RELIGIOUS CORPORATION.—CHURCHYARD BURIAL
VAULTS.

The rights of owners of burial vaults in churchyards in cities, in respect to resisting a sale of the premises by the church.

Motion to continue a temporary injunction; and trial by the court.

This was an action brought by the plaintiff in his own right, and as a trustee of Sarah Huyler and Maria E. Richards, against The Northwest Protestant Reformed Dutch Church in the city of New York, to restrain them from removing from the plaintiff's vaults in the churchyard, the remains of deceased persons

reposing there, to compel them to restore such remains if they had been removed, and for damages.

A similar action brought by Henry A. Bogert against the same defendants was brought on at the same time.

The complaint in the first action set up a claim to a vault in the grounds of this church on Franklin-street under the following deed, of the minister, elders, and deacons of the church :

The parties of the first part "for and in consideration of the sum of Two hundred dollars, current of the United States of America, to them in hand paid by the party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto the said party of the second part, and to his heirs and assigns forever, all that certain lot or piece of ground situated, lying, and being in the churchyard above said, distinguished and known, beginning on the northwest corner of the ground belonging to the New York Sugar Refining Company on Franklin-street, thence running westerly along Franklin-street twenty feet, thence southerly to the northeasterly corner of the church and along the church twenty feet, thence easterly twenty feet to the line of the said Sugar-house Company, thence along the line of the said Sugar-house Company to the place of beginning, the whole of it to be twenty feet square. To have and to hold all the said lot of ground with the appurtenances unto the said party of the second part, his heirs and assigns, to their only proper use and behoof of the said party of the said second part, his heirs and assigns forever; provided always, and these presents are upon these conditions nevertheless, that the lot of ground shall never be used, occupied, or appropriated by the said party of the second part, his heirs or assigns, for any other use or purpose than to inter such dead bodies in graves or in vaults as the party of the second part, his heirs and assigns, shall from time to time think proper. And, further, the parties of the first agree with the party of the second part that they shall never suffer it to be dug up or destroyed; but that it shall be the duty of the parties of the first part, and their successors in office, to keep it harmless and never to appropriate it to any other use than to deposit the

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dead as aforesaid, without the consent of the party of the second part.

"In witness," &c.

The complaint set up that the church officers had agreed to sell the church property, including the above vault, and had already removed some of the remains of the plaintiffs' relatives from the vault against the consent of the plaintiffs, and without their knowledge, and were about to remove all the residue.

The only difference in the facts in the second case, appears in the opinion.

MITCHELL, J.—Motion for continuance of a temporary injunction to prevent the defendants from destroying a vault or interfering with the heirs of Sarah Huyler, and the plaintiffs in the second suit, in the use of the vault.

The vault is in part of the church ground of the Dutch Church in Franklin-street. The church was incorporated in 1808, but the legal title to the land remained in trustees until 1832, when by a decree of the Court of Chancery the trustees conveyed to the church.

In the mean time the church must have acted as the owner of the land, and in 1817, it conveyed by deed to Westervelt and his heirs forever the land on which the vault is erected, with a proviso that it should be used by him and his heirs only as a burial place for such persons as he and his heirs should choose; and the church covenanted that it would never suffer that ground to be used for any other purpose than a burial ground, and that it would not suffer it to be dug up or destroyed.

Westervelt, by his will directed that none but his near relations, and Mrs. Sarah Huyler and her daughter, Eve A. J. Huyler, should be deposited in the vault.

Eve, the daughter, died in 1840, leaving a son and a daughter; this daughter married Mr. Richards, one of the plaintiffs, and died leaving him and a daughter, Maria E., the other plaintiff in the first suit, surviving. Mrs. Huyler died in 1843, having first made her will, and thereby appointed Mr. Richards her executor.

The plaintiffs in the second suit are some of the heirs at law of Westervelt, the grantee of the vault.

Some of the heirs of Westervelt, or some one claiming under them, instituted a suit in partition as to this vault, making (so far as appears) all proper persons parties, unless the plaintiffs in the first suit were necessary parties, and obtained a judgment for a sale of the vault, and it was sold accordingly, and bought by or for the church.

The church then in 1853, applied to this court and obtained an order for the sale of the whole church ground, no exception being made of the vault, and no notice given to the plaintiffs in either of these suits.

Before these actions were commenced, the authorities of the church caused the bodies in all the vaults attached to the church to be carefully removed and deposited in other grounds, the bodies in this vault being deposited in Greenwood, and, it is understood, with proper means of distinguishing the burial spot of each body.

The church was incorporated after the passage of the law prohibiting religious societies from transferring the absolute title to their estate without the sanction of the chancellor; no such sanction was obtained for the grant to Mr. Westervelt. It would be unnecessary if the grant must be understood as from its nature to continue only so long as the church should continue to occupy the ground for religious purposes, or to own the land, or subject to the right of the church to convey absolutely on obtaining the sanction of the chancellor.

These limitations, or some of them, are implied in the grant of a pew, although the form of the grant be absolute and unconditional.

There are reasons why the same limitations might be held applicable to a grant of ground for a vault in a city, especially one like this.

It must have been known when the grant was made, and then entered into the consideration of both parties, that from the regular growth of the city, places then dedicated to religious worship would become unsuitable for that purpose in the course of years, by the congregation moving further up town and deserting the old location, and these places becoming fitted only for business purposes, and much more valuable on that account.

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Those who had at heart the cause of religion could not have intended to give or take any grant which would prevent the church to which they were attached, from conforming to these necessary changes; to do which the church must sell all its grounds for business purposes, and invest the proceeds in other lands, and a new house of worship accessible to the worshippers, and in other burial grounds which would continue to be devoted for the burial of the dead.

He, whose religious sympathies led him to select the grounds attached to the church of his faith for the deposit of his dead, and of his own mortal body, must have done so not because he had a special attachment to this spot of land after it should be surrounded by houses where nothing should be spoken of or thought of but the means of increasing this world's wealth; but because it was part of the grounds consecrated to the Almighty, and from which the thoughts of earthly gains should be banished.

His choice and his command would have been as Joseph's was when he "took an oath of the children of Israel saying, God will surely visit you, and ye shall carry up my bones from hence."

The feeling of the Christian who selects consecrated ground for his burial, is that his body may be wherever his church may be, or wherever that church may continue to deposit its dead; and not that it should remain in a place that had become desecrated from changes necessarily occurring.

"Where thou diest, will I die, and there will I be buried;" shows the desire that neither death nor the changes of the world should separate, even after death, those who were united in life.

In this case the occupation of the ground for its original purposes is necessarily abandoned. How, then, will the defendants best fulfil their trust to the grantee? By leaving his vault the only consecrated ground, while all around it is devoted to gain? or by transferring the remains of those dear to him to other grounds, where their ashes will mingle with the ashes of others of the same faith?

There is some reason, therefore, for implying a limitation of a grant for a vault, although it be absolute in its form, and that

that limitation was within the intention of the parties (when the ordinary course of events is considered), and so is to be read as bearing on the face of the grant as though the limitation formed part of the grant.

It may be that this is not so clear that the plaintiffs should not have the injunction continued to the hearing, if the remains of their connections were still in the vault.

But as those remains had been removed before this suit was brought, and have been previously cared for, the only important question remaining now is, who has the legal title to the ground, and whether the defendants should compensate or not the plaintiffs for injury already done, or secure to them equally valuable ground in another place?

All those questions should be reserved to the hearing.

There are also other questions to be passed upon,—as, whether the plaintiffs' right is not cut off by the sale in partition; or whether the ownership of a vault is of such a character that it was never intended to be partitioned, and so not to be sold in a suit for partition? What relations of the deceased, or what persons connected with them, or with the original grantee of the vault, may have a right to stay a sale of the ground on which the vault is placed; and whether any of these plaintiffs stand in that relation to the grantee?

These questions place the plaintiffs' claim in such doubt that, under the circumstances now existing, the injunction should not be continued.

It is accordingly dissolved so far as granted, and the motion for its continuance denied. Ten dollars costs, to abide the event.

On a trial of these actions before the court, the following opinions were rendered:

ROOSEVELT, J.—The plaintiffs claim to be vault-owners in the churchyard of the Dutch Church in Franklin-street, lately sold under an order of the court.

They demand that the defendants be compelled to replace the bodies which have been removed to Greenwood; to restore the vault to its original state, and to refrain, under pain of commitment, from any further interference with their rights.

The character and legal attributes of burial property, as distinguished from ordinary absolute ownership in fee, are not perfectly clear. In the present case a preliminary injunction was at first granted by one of the judges; but on a further although not final hearing by the same judge, was dissolved.

The remains of the deceased relations had already been removed, and removed, I must say, to a much more suitable if less legal resting-place, than the heartless bowels of a noisy, bustling, money-making city. Nothing is left, therefore, now that all the pleadings and proofs are before the court, but to determine the mere dry legal rights of the parties.

Were it otherwise, however, and could the dead without rising speak; a voice, it seems to me (in the apt quotation of Mr. Justice Mitchell), would assuredly be heard, saying: "Ye shall carry up my bones from hence."

Franklin-street, between Church-street and West Broadway, has lost every attribute of repose. Its unfitness for a cemetery, if spiritual bodies can see and feel, must be as palpable to the dead, as to the living; still the plaintiffs insist that there shall be no removal, and that, as matter of legal right, without their consent there can be none.

In 1817, the corporation of the church, it appears without any previous order of the chancellor, conveyed a small piece of ground in the churchyard, adjoining the church edifice, to the grantee, "his heirs and assigns forever," to be used, in the language of the instrument, for the purpose of a burial place, and for no other purpose whatever.

In this plat, the grantee soon after his purchase, constructed a vault, which became the depository from time to time of his own remains and those of deceased relatives, till the year 1852; when, on the petition of the corporation of the church, an order was made by this court authorizing a sale of the church edifice, and of the whole church premises, including the ground in question.

A sale was accordingly made, and on report of its terms and conditions, was duly confirmed, and the bodies thereupon, with the approbation of a large majority of the relatives, decorously removed to a suitable burial-place, purchased for the purpose, in the cemetery at Greenwood.

Did sale, then, thus authorized and confirmed, divest the title

of the representatives of the grantee in the vault which their ancestor had purchased?

The right of burial, it seems to me, when confined to a church-yard, as distinguished from a separate, independent cemetery, although conveyed with the common formula of "heirs and assigns forever," must stand upon the same footing as the right of public worship in a particular pew of the consecrated edifice.

It is an easement in, and not a title to, the freehold—and must be understood as granted, and taken, subject (with compensation of course) to such changes as the altered circumstances of the congregation or the neighborhood may render necessary.

The selection of a place of burial, in the ground forming the site of a church, we may safely say, is always made with reference to its religious associations, and with an eye to their continuance.

Suppose the edifice to be destroyed by fire without the means of rebuilding—an event not entirely improbable or unprecedented, must the premises continue an unsightly ruin with no power anywhere to meet the emergency?

Or must we not rather, from the nature of the contract, and from the character of the subject of its provisions, infer a silent understanding between the parties (quite as operative as if expressed in words at length), that in such case the corporation of the church—in other words, the representative body of whom the pew-owners, vault-owners, and other members of the particular religious association may be said to be the constituents—should sell the real estate which had become unfit for its original object, and "with the consent and approbation of the chancellor, apply the moneys arising therefrom to such uses as they should conceive to be most for the interest of the society to whom the real estate so sold belonged."

Every deed of conveyance, whether for a pew, or a vault, or a house, is a contract between the parties, to be interpreted according to their actual or fairly to be presumed intent.

The statute, to prevent all doubt on this point, makes it in terms the "duty" of all courts of justice, "in the construction of every instrument creating or conveying any interest in land" to carry into effect "the intent of the parties." (1 *Rev. Stat.*, 748.)

This intent—the statute further provides—shall be “collected from the whole instrument,” and of course from its scope, object, and subject-matter, and not from the mere letter of a particular sentence.

Although, therefore, the deed in question purports to convey a certain specific piece of ground, twenty feet by twenty, we must bear in mind that it describes the premises as belonging to a church corporation, as adjacent to a church edifice, as in a churchyard, and to be used exclusively as a place of interment, and subject to church assessments for regulation and repair.

In this view, both parties, it seems to me, the one in executing, the other in accepting the conveyance, must have considered it as the grant of a mere easement, and not of an ordinary absolute estate in fee.

And hence no order of the chancellor was applied for, and in that view, none was required—although such order, in all cases of church property is indispensable to an absolute conveyance of the soil.

Like the sale of a church pew, which gives the mere right to worship in the particular place while the church stands, and is occupied for religious purposes, the sale of a church vault gives, it would seem, the mere right of interment in the particular plot of ground, so long as that and the contiguous ground continues to be occupied as a churchyard. The owner of the easement may be, in case of disturbance, and no doubt is, entitled to a reasonable compensation or equivalent; but he cannot interpose a veto to the disposition of the soil, should the court, as was actually the case in this instance, on application of the legitimate church officers, deem such disposition proper, and order it accordingly.

Every person purchasing either a pew in a church edifice, or a grave in a churchyard, appendant to a church, does so with the full knowledge and implied understanding that change of circumstances may, in time require change of location, and that the law (a positive statute which has been in existence nearly half a century), looking to such exigency, authorizes the corporation, when it arrives, as the representative of all interests, with the sanction of the court, to sell the soil in absolute fee, discharged of all easements, and to make some other more appropriate investment or disposition of the proceeds.

Richards *a.* The Northwest Dutch Church.

Counsel have cited several authorities in support of their respective positions. Those relating to the pew-rights are uniform. They all concede that such rights, however strongly conveyed, are devested by a regular sale of the church edifice.

Those relating to vault-rights are discordant, and neutralize each other. Vice-chancellor McCoun, in the Brick Church case, held one way, and Mr. Justice Edwards in that of another church, held the opposite. (See 3 *Edw.*, 155; and 8 *Barb.*, 130.)

The reasoning, which leads to the result arrived at in the case of church pews, is applicable, as it seems to me, in a great degree to the case of church vaults. It proceeds upon the assumption—a necessary assumption—that church grants in such cases are made upon the implied condition, that the land shall be subject to the right of what may be called eminent domain—that is, subject to the right of resumption whenever the public use, or a change of circumstances may, in the judgment of the church and of the court, require the exercise of such right; but subject also to the duty of making a just and fair compensation, in the form of money or other suitable equivalent, if required.

As the complaint in this case only calls in question the validity of the sale, and is not adapted to a claim for compensation, it must be dismissed with costs.

BOGERT *a.* THE NORTHWEST PROTESTANT REFORMED DUTCH
CHURCH.

This case presents the same questions as that of Richards and others, with the additional one that a decree of sale in a partition suit, in which all the owners of the vault, including the plaintiffs, were parties, was made by consent, and a title conveyed, under or through it, to the defendants or their grantees.

Now, although an easement, such as the right of burial, may not be a proper subject of partition, and although the proceeding might, on that ground, have been demurred to, yet no objection at the proper time having been taken, and an express consent, even, having been given, the sale so made by decree, must have the same effect as if made by direct conveyance, executed by all the parties to the partition suit.

Bill dismissed, with costs.

COOK v. FARMER.

Supreme Court, First District; Special Term, August, 1860.

SERVICE BY PUBLICATION.—AFFIDAVIT OF ABSENCE.

An affidavit made to obtain an order for service of summons by publication is insufficient to sustain an order which directs publication merely, without directing service by mail, unless such affidavit shows the fact of plaintiff's inability to discover the place of residence of the defendant sought to be served.

An order made on such a defective affidavit is without jurisdiction.

Motion to compel purchaser at a judicial sale to take a conveyance.

The facts are stated in the opinion.

INGRAHAM, J.—This was an action brought for the partition of lands. One of the defendants, Josephine A. Demphill was an infant, and resided in California. In order to obtain jurisdiction over this defendant, it was necessary either to make a personal service, or to proceed under section 135 of the Code by publication. On the plaintiff's affidavit, it appeared that "*Josephine Demphill resided in California, but her present place of residence therein deponent was unable to state.*" On this affidavit, the judge made an order that it appeared to his satisfaction that the defendant Josephine could not after due diligence be found within the State, and that it appeared in like manner that the residence of Josephine Demphill was neither nor could with reasonable diligence be ascertained by the party making the application, and he directed publication, without directing service on the party.

The Code provides (see § 135) that when publication is ordered, the court must direct a copy of the summons and complaint to be deposited in the post-office, directed to the party at his residence, unless it appears that such residence is unknown to the party, *nor can with reasonable diligence be ascertained by him.*

The fact of non-residence is to be made out to the satisfaction of the judge. The fact of inability to discover the residence of the defendant is to be made to appear.

There is but one way in which facts can be made to appear, that is by evidence. In applications of this kind it must be by affidavit.

In *Hallett a. Righters* (13 *How. Pr.*, 43), Justice Smith says: "The facts should have been stated in the affidavit presented to the judge, which should be filed with the order, and the order must be construed in connection with the affidavit."

In *Sibley a. Waffle* (16 *N. Y.*, 189), it is said, "The affidavit showed what the officer considered satisfactory proof." "It is not to be presumed that he had other evidence, or that the publication was different from the statement in the affidavit."

In *Warren a. Tiffany* (9 *Abbotts' Pr.*, 67), the affidavit was referred to, to show that an order of publication was unauthorized, and the order was held to be void because the affidavit did not contain the facts necessary to warrant that proceeding. I think it clear in this case, that the affidavit furnished no evidence that any attempt had been made to discover the residence of the defendant. The party making said he could not state where it was, but he should use efforts to discover it. In such a total absence of proof of any attempt to discover such residence, it is difficult to adopt the conclusion that any jurisdiction over this defendant had been obtained.

POTTER, J., in *Titus a. Relyea* (16 *How. Pr.*, 371), says: "We are bound to see that the statute has been strictly pursued. The persons and estates of individuals would be subject to alarming hazards, if jurisdiction could be obtained over them by any thing less than the fullest compliance with all their requirements."

The affidavit was in my judgment clearly defective, and the fact that the judge said he was satisfied upon a point on which no evidence was produced, does not confer jurisdiction.

The present application is to compel the purchaser to take the property notwithstanding the defect. If I am right in the views above expressed, the title is defective, and the motion should not be granted.

Even if the point was a doubtful one, a purchaser under a

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judicial sale should not be required to run the hazard of such an objection. He has no covenant to protect him in case of error, and he should never be required to complete the purchase under such a sale if there is any reasonable doubt as to the sufficiency of the title.

The motion must be denied.

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Supreme Court, First District ; Special Term, June, 1860.

APPEAL.—AMENDMENT.—TERMS OF ALLOWING.

An order which violates the strict legal rights of a party is appealable.

On allowing an amendment introducing a new cause of action, or introducing allegations necessary to complete the facts alleged, which otherwise would not show a cause of action, defendant should be allowed to answer as a matter of right.

In such case the court cannot require that testimony already taken in the cause should stand.

Amendment should be made not at the expense of the opposite party.

Appeal from order allowing amendment of complaint.

This action was commenced in March, 1859 ; the complaint charged the defendants with an indebtedness of \$141,586, for moneys fraudulently obtained from plaintiff between the first day of January, 1849, and the 16th day of March, 1858, by means of overdrafts and false entries in the books of account of the plaintiff, in collusion and with the aid of a book-keeper in the employ of the plaintiff during that time.

A judgment was obtained by default against the defendant, Garrett S. Mott ; the default was afterwards opened on terms, but the judgment ordered to stand as security. Both defendants, by separate answers, denied the complaint, and set up the statute of limitations. After answer, the defendants were arrested and held to bail in the sum of \$142,000.

The cause was by consent referred, and, on the hearing before the referee, the evidence given covered the whole period stated in the complaint, from which it appeared that the plaintiff was an institution organized under the general banking law, in December, 1852, and commenced business January 1, 1853; that the institution known as the Union Bank, existing before the last date, was chartered in 1811 by the name of "The President, Directors, and Company of the Union Bank of the city of New York," and that the said charter expired, and said bank ceased to exist, on the last day of December, 1852; that all the claims against the defendants but \$1000 occurred previous to 1852, and were held by the plaintiff as assignee.

Upon the close of the proof, it was insisted that, under the complaint, the plaintiff was not entitled to recover for any claim prior to 1853. The court subsequently allowed an amendment by inserting allegations to show those facts, upon the following terms: the judgment to stand as security; the undertaking and bail to be discharged without prejudice to a new application for an arrest under the amended complaint; the order of reference to stand, and the testimony already taken to be made applicable to the amended pleadings; the answers already put in to stand unless cause should be shown to the contrary; and plaintiff to pay \$10 costs of motion. The motion for leave to amend is reported 10 *Ante*, 372. From this decision the defendants appealed.

David Dudley Field, for the appellant.—I. The court has not power to grant this amendment. The trial now pending is for the sole purpose of determining whether the judgment already recovered shall be enforced. The court could not insert a new cause of action into the judgment-roll now on the records of the court, and it cannot do this indirectly by making this amendment. A new cause of action now interposed may give plaintiff a lien under that judgment for a cause of action not contained in its record; and for which, for aught the record would show, a new action might be instituted. (*Miller v. Eagle Life Insurance Co.*, 3 *E. D. Smith*, 184; *Pierce v. Thomas*, 4 *Ib.*, 356; *Swartwout v. Curtis*, 4 *Comst.*, 415.)

II. If the court had this power, the amendment must distinguish between the different causes of action. Two counts

for the same cause are not allowable. If a second cause be inserted for \$140,000, the first must be reduced to \$1000. (*Whittier a. Bates*, 2 *Abbotts' Pr.*, 477; *Stockbridge Iron Co. a. Mellen*, 5 *How. Pr.*, 439; *Churchill a. Churchill*, 9 *Ib.*, 552; *Lackey a. Vanderbilt*, 10 *Ib.*, 155; *Dickens a. New York Central Railroad*, 13 *Ib.*, 228; *Ford a. Mattice*, 14 *Ib.*, 91.

III. The amended complaint must be verified.

IV. If the amendment be made, the defendant has the right to answer the new cause of action. Here the allegation of an assignment from one bank to the other is not denied, and would stand admitted. It would be also necessary, in answer to the new cause of action, to follow up the denial of indebtedness by denials of the newly alleged facts; namely, in the obtaining of money from the old bank by over-drafts upon that bank, and the assignment to the plaintiff before the commencement of this action.

V. The order of reference was by consent, and referred to the issues then existing; the court can only extend the defendant's consent to a reference of other issues, not anticipated by him when his consent was given.

John Foot, for respondent.—I. The court had full power to make the amendment. (*Code*, §§ 169, 171, 173; *Hagins a. De Hart*, 12 *How. Pr.*, 322; *Hall a. Gould*, 3 *Kern.*, 134; *Prindle a. Aldrich*, 13 *How. Pr.*, 466.) The claim is not changed by the amendment asked and allowed. The claim is the relief sought. An amendment of a complaint changing the cause of action may be allowed if the *claim* remain the same. (*Chapman a. Webb*, 6 *How. Pr.*, 390; *Prindle a. Aldrich*, 13 *Ib.*, 466.) A variance sufficient to defeat the action, must leave the case unproved in its entire scope and meaning. If left unproved in some particulars, it is a subject of amendment. (*Fay a. Grimstead*, 10 *Barb.*, 330.) In this case the referee decided the proof complete with respect to \$1000 of the claim. The balance if left unproved is, therefore, the subject of amendment. Full proof has been given in respect to the balance of the claim, and the assignment of the claim. All that is asked, is an allegation setting it forth in the complaint to conform the pleadings to the facts proved. The issue is not changed. The old complaint covers the money claimed in the

amendment. The defendants' answers fully meet the amendment allowed. The defendants, to show that they were not indebted, proved the existence of the old bank. The plaintiff, to meet and rebut that fact, showed the assignment to the plaintiff. The defendants attacked its legality. Full proof has been given respecting it. All that was asked, was to conform the pleadings to the facts proved before the referee.

II. The amendment was allowed after full argument and proof of its necessity, and it should not be altered in its terms.

BY THE COURT.*—E. DARWIN SMITH, J.—The first question presented upon this appeal is, whether or not the order of the special term is reviewable. The power of this court to amend a complaint in any stage of the action, by allowing the plaintiff to insert a new count therein, cannot be doubted. An application for leave to make such amendment is addressed to the sound judicial discretion of the court. The exercise of this discretion is among the most embarrassing duties cast upon the courts, and yet its existence and exercise is indispensable to the proper administration of public justice.

It is well-settled law, that orders resting in discretion cannot be reviewed upon appeal. But this doctrine is obviously subject to some limitation. The discretion which is confided to the courts is not an arbitrary and capricious discretion. It is a power regulated by legal principles, and which cannot be used for the purpose of injustice or oppression. An order in an action which the court may in its discretion grant or deny, clearly cannot be reviewed upon appeal, unless in the *terms* which it imposes, or upon which it is granted, it invades "*some substantial right*," or transcends the limits of legal discretion.

Courts constantly exercise the power, when a party has made a slip in his proceedings, or is in default, and asks a favor, to grant such favor upon conditions that the party asking it waives some strict legal right,—such as that he consent that a judgment be entered to stand as security,—that he consent to refer a cause not referable,—that he takes short notice of trial,—that he indemnify the opposite party by the payment of costs, and other like equitable terms.

* Present, INGRAHAM, E. DARWIN SMITH, and MULLEN, JJ.

In such cases the order is not appealable. But this rule only applies as against the party asking for a favor. A party asking no favor of the court, and standing upon his strict legal rights, and who has been guilty of no default, cannot be required to waive any of those rights, and they cannot be taken away from him by the court without his consent. It is because I think the order granted at special term violates this principle that I think it may so far be reviewed upon appeal.

When the trial was arrested before the referee, and the amendment granted by him was allowed, the defendants had really succeeded in successfully defending the suit to the extent of the whole claim of the plaintiffs, except the sum of \$1,000. The plaintiffs then asked to insert a new count in their complaint to cover a claim for the sum of \$141,586, which they had acquired by purchase and assignment. We agree with Judge Allen, that the referee had no power to allow such an amendment, and that it was not a case of variance, and was not such an amendment as should be allowed on the trial of a cause; but the *court* could undoubtedly allow such amendment upon proper terms. But when the plaintiffs asked and were allowed to insert such new count for a second and separate cause of action, we think the defendants had the right to have such amended complaint served upon them in the usual manner, and had the legal right to answer or demur to the same as in other cases. Of this right they were deprived by the order made at special term, extending the answer to such amended complaint.

I cannot conceive upon what ground the defendants could be lawfully deprived of this right. It seems to me it was just as absolute as though a new suit had been commenced for this \$141,586. The right to answer or demur to a complaint, or to an amended complaint, inserting an entire new cause of action, is a strict legal right, and the court cannot take it away from any person, not in default, who is prosecuted in a suit at law.

The defendants did not, in this case, ask any favor. They were not before the court, therefore, in any position to be required to waive any legal rights, or to submit to any equitable terms. It may be that the right to answer over would be of no

practical use to them ; but that is a question the court cannot decide for them. They are entitled to decide it for themselves upon the advice of their counsel.

The order deprives them of this right, and so far, I think, it *affects a substantial right*, and within the spirit and intent of subdivision number 3 of section 349 of the Code, is reviewable upon appeal.

The provision in the order also, that the testimony already taken on the first hearing be adopted on the further hearing under the amended complaint, as testimony in the case under the pleadings as amended, also, I think, invades a substantial right of the defendants.

If such evidence was pertinent to the new issue to be formed, and the defendants were satisfied to have it received upon the trial of such issue ; and if they had fully cross-examined the witnesses of the plaintiffs—they probably would do so—it might have been with their consent, and doubtless would, in fact, with such consent, have been so used and applied. But I cannot see what power the court has, arbitrarily and without such consent, in opposition to the wishes of the defendants, to order that it shall be so received and used.

As we think the order as it stands cannot be sustained, the question is presented whether we shall reverse or modify it. Ordinarily the court of review should in such cases make such order as the court below, in its opinion, should have made. The order, so far as it grants leave to amend, is right, and should be affirmed ; but as the question of *terms*, except as hereinbefore considered, has not been particularly discussed here, I should have preferred simply to reverse the order and leave the court at special term, upon a hearing of the parties, to make such new terms as may be proper in view of our decisions. But the press upon the courts in this city, in respect to this particular class of business, is so great, that it is quite undesirable and inexpedient to send cases back to special term unless it is indispensably necessary so to do.

The rule in all cases of the amendment of pleadings is, that the amendment shall not be made at the expense of the opposite party, and that he be indemnified for all additional expense involved in such amendment.

The amendment in this case upon strict right, and unless the

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defendant consents to use the testimony before taken by the referee upon the new issues to be found, involves virtually a new trial of the cause.

We think, therefore, the amendment should not have been allowed without payment at least of a trial fee, and the disbursements incurred by the defendants. The order above should, therefore, so far as it extends the answer to the amended complaint, and adopts or applies the testimony taken before the referee to the issues to be made by the amended pleadings, be reversed with \$10 costs, and that the residue of said order be affirmed upon the payment of a trial-fee, and the disbursements incurred by the defendants for witness-fees, printing expenses, and other disbursements on such trial and since. The plaintiffs to serve their amended complaint in the usual manner, making such amendments as they may be advised, and the defendants to have the usual time to answer or demur to such amended complaint; and it is so ordered.*

MULLIN, J., concurred.

* The Revised Statutes provided that on amending a pleading, in substance, the adverse party should be allowed to answer the amended pleading. (2 *Rev. Stat.*, 424, § 2.)

The following are the cases both before and since the Code, illustrating the rules which have guided the courts in respect to the terms on which amendments to the pleadings should be allowed :

1. *Pleading anew.*

Leave to amend declaration, after plea, should be on payment of costs, and with leave to defendant to plead anew. (*Supreme Ct.*, 1800, *Holmes v. Lansing*, 1 *Johns. Cas.*, 248.)

If plaintiff is allowed to amend, the order may provide that defendant may plead *de novo*. (*Supreme Ct.*, 1803, *Webb v. Wilkie*, 1 *Ct.*, 158.)

The appellate court allowed the defendant in error to amend his declaration, by averring that the plaintiffs in error were partners, on paying the costs in the court below, subsequent to the declaration; and the plaintiffs in error were allowed twenty days, after service of such declaration, to pay the amount recovered below, without costs, or to plead; and if they pleaded, a *venire de novo* was ordered. (*Supreme Ct.*, 1811, *Pease v. Morgan*, 7 *Johns.*, 468.)

After notice of trial, plaintiff was permitted to amend by changing venue, on paying costs of motion, and of the former plea, if a new defence was interposed. (*Supreme Ct.*, 1832, *Farrington v. Suydam*, 9 *Wend.*, 430.)

Where a new count for the same cause of action is added before trial, the terms should require payment of costs of the motion, and of the pleas, if they are withdrawn, or a new defence made. (*Supreme Ct.*, 1834, *Saltus v. Bayard*, 12 *Wend.*, 223.)

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Plaintiff was allowed to add new counts, on the same cause of action, to his declaration, after issue joined, and defendant had examined a witness on commission, on payment of costs of opposing motion, costs of a new commission, if one should be necessary, and costs of the plea,—the newly-discovered evidence, which was the ground of their application, being shown to have no bearing on the testimony taken. (*Supreme Ct., Sp. T.*, 1844, *Warren v. Campbell*, 1 *How. Pr.*, 60.)

If the plaintiff is allowed to amend, after a nonsuit, for want of a count, or of a count substantially sufficient, he should be required to pay the defendant's cost of the plea, and the subsequent proceedings, and the costs of opposing the motion. (*N. Y. Superior Ct.*, 1847, *Bennett v. City of New York*, 1 *Sandf.*, 658.)

Terms of allowing a new demise to be added, in ejectment. (*Anon.*, 2 *Cui.*, 260.)

In ejectment, a new demise by a new lessor was allowed to be added, the defendant having leave to withdraw his plea, and, if he elect to do so, the plaintiff to pay the costs of it. (*Supreme Ct.*, 1798, *Wemple v. McDougall*, 2 *Johns. Cas.*, 2d ed., 419.)

Before trial, a declaration in ejectment may be allowed to be amended by enlarging the term, or adding a demise [1 *Cal.*, 251], though if the amendment may deprive defendants of their only defence, they should have leave to discontinue. (*Supreme Ct.*, 1821, *Lion v. Burtis*, 18 *Johns.*, 510.)

After nearly six years had elapsed since service of the declaration, leave was given to amend, by adding new demises, on the plaintiff's paying all the costs then incurred; if the defendant elected to relinquish his defence. (*Supreme Ct.*, 1803, *Jackson v. Kough*, 1 *Cui.*, 251.)

Where defendant swears that the amendment will render an almost entire new answer necessary, costs of the original answer should be imposed. [1 *Hoffm. Pr.*, 285.] (*V. Chan. Ct.*, 1841, *Grim v. Wheeler*, 3 *Edu.*, 448.)

An amendment of the complaint, after issue joined and examination had of a witness *de bene esse*, was allowed, on allegations that the plaintiff's attorney had misunderstood the cause of action, on terms giving defendant leave to answer, and costs of proceedings before notice of trial, and costs of motion, but not the expenses of the examination. (*Supreme Ct., Chambers*, 1848, *Hare v. White*, 3 *How. Pr.*, 296; 8 *C.*, less fully reported, 1 *Code R.*, 70.)

Where leave is given, after trial before a referee, to amend the summons and complaint, by adding a new and distinct cause of action not connected with those set forth in the original complaint, the order should only be granted upon condition that the plaintiff stipulate to set aside the report, and vacate the order of reference, with costs to abide event; and the order should provide for service of the amended summons and complaint, and for time for defendant to answer. (*Alaben v. Wakeman*, 10 *Abbotts' Pr.*, 162.)

2. New trial.

Plaintiff had a verdict, notwithstanding a variance, and defendant moved for a new trial, showing that he had a defence, but that he relied on the variance, so as not fully to prepare. *Held*, that plaintiff should not have leave to amend, unless he consent to a new trial. (*Supreme Ct.*, 1827, *Hoffnagle v. Leavitt*, 7 *Cow.*, 517; and see *Hull v. Turner*, 1 *Wend.*, 72.)

The defendant, having a defence on the merits, did not prepare for trial, but relied only on a variance; but it was disregarded by the judge. *Held*, that plaintiff might vacate his verdict, and amend, but without costs. (*Supreme Ct.*, 1834, *Carpenter v. Payne*, 10 *Wend.*, 604.)

On motion in arrest of judgment where the error, though fatal, is clerical,—*a.g.*,

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entitling a declaration as of a term prior to the accruing of the cause of action,—the plaintiff should be permitted to amend, and keep his verdict, on payment of all defendant's costs. (*Supreme Ct.*, 1833, *Thomas a. Leonard*, 11 *Wend.*, 53.)

After issue joined on demurrer, plaintiff proceeded to trial, and had a verdict on the facts, and subsequently judgment was given against him on the demurrer.

Held, that he should have leave to amend on relinquishing the verdict and paying costs of demurrer, and all costs subsequent to the issue. (*Supreme Ct.*, 1838, *Fidler a. Cooper*, 19 *Wend.*, 285.)

8. Costs.

After an amendment without costs, a second amendment was allowed, on payment of costs of the demurrer. (*Supreme Ct.*, 1804, *Hallock a. Robinson*, 2 *Cai.*, 233.)

After report of referees, for plaintiff, a variance between the agreement counted on, and the copy declaration served, through clerical error, was amended on payment of costs of motion, as if it had been made before trial. (*Supreme Ct.*, 1826, *Every a. Merwin*, 6 *Cow.*, 360.)

On setting aside a verdict, on account of the admission of evidence, which was inadmissible under the plea, leave to amend may be given, so as to let in the evidence, on payment of all costs since the original plea. (*Supreme Ct.*, 1830, *People a. Holmes*, 5 *Wend.*, 191.)

Nine years after the suit was commenced, and after three trials, on each of which a special agreement had been proved, without objection, under common counts, &c., plaintiff was allowed to amend by adding a special count on the agreement, on payment of all costs subsequent to the declaration; it appearing that if the action were to be discontinued, the statute of limitations would preclude a new action. (*Supreme Ct.*, 1830, *Miller a. Watson*, 6 *Wend.*, 506.)

After demurrer, leave to amend a clerical mistake was allowed, on payment of costs of demurrer and of motion. (*Supreme Ct.*, 1831, *Keeler a. Shears*, 6 *Wend.*, 540.)

Where the objection to the want of an appropriate count was not taken until the summing-up on the trial before referred, after the merits had been fully gone into, the plaintiff, on being allowed to amend, after report in his favor, should be only required to pay costs since the objection for variance was taken—i. e., costs of opposing motion, and of preparing to set aside the referee's report, and of subsequent proceedings thereon. (*Supreme Ct.*, 1839, *Flowers' Executors a. Garr*, 20 *Wend.*, 668.) *So held*, also, where the objection was taken during the progress of the trial, before the testimony was closed. (*N. Y. Superior Ct.*, 1847, *Smith a. Proctor*, 1 *Sandf.*, 72.)

Plaintiff was nonsuited because he had no count suited to his evidence, and the Court of Errors reversed the judgment with a *venire de novo*—costs to abide event.

Held, that plaintiff's motion for leave to amend could only be granted on payment of all the costs in the court below since the plea, and on his relinquishing his contingent right to costs of the court above, (*Supreme Ct.*, 1844, *Downer a. Thompson*, 6 *Hill*, 377.)

A plaintiff may amend his process and declaration, by changing the form of action from covenant to assumpsit, upon payment of costs of opposing motion only, where the objection was strictly technical, and the defendants did not raise it until the cause had been through a long course of litigation, and the defendants had, in the first place, erroneously issued the instrument declared on, by not

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affixing their seal. [2 Rev. Stat., 848, 2 ed.; 6 Cow., 366; 7 Ib., 92, 483; 9 Wend., 809, 811; 10 Ib., 604; 15 Ib., 410; 19 Ib., 541, 542; 22 Ib., 148; 1 Hill, 121; 2 Ib., 126; 6 Taunt., 419, 422; 1 Bing. N. C., 170.] The terms, in these amendments, are always discretionary with the court—each case depending upon its own circumstances. (*Supreme Ct., Sp. T.*, 1845, *Alston a. Mechanics' Mutual Insurance Co.*, 1 *How. Pr.*, 82.)

Where the defendant objects to the form of the action at the first opportunity, plaintiff's leave to amend should be on payment of all defendant's costs, and relinquishing his contingent right to costs theretofore made. [6 Hill, 377.] (*Supreme Ct., Sp. T.*, *Carrier a. Dellay*, 8 *How. Pr.*, 173.)

Where the objection was taken at the earliest opportunity, and plaintiff insisted on proceeding with the trial, and the report was against him, he was required to pay all the costs of the reference and subsequent proceedings. (*N. Y. Superior Ct.*, 1847, *Proctor a. Andrew*, 1 *Sandf.*, 70.)

The plaintiff, on petition, after exception to the answer, may have leave to amend, by adding new charges and new parties, upon payment, not of a fixed sum, but of costs, to be taxed. (*Chancery*, 1818, *Beekman a. Waters*, 3 *Johns. Ch.*, 410.)

An amendment, by striking out counts or parts of counts from the declaration, allowed by a judge during the trial, without costs, is authorized by section 149 of the Code of 1848, which permits amendment on such terms as may be proper. (*Ct. of Appeals*, 1851, *Cayuga County Bank a. Warden*, 6 *N. Y. (2 Seld.)*, 19.)

In an action on a promissory note brought by indorsee against maker, the complaint merely alleged that the plaintiff was the lawful holder of the promissory note, but omitted to state that the note was indorsed by the payee to plaintiff.

Held, on demurrer, that the defect was technical, and plaintiff might amend without costs. (*N. Y. Com. Pl., Sp. T.*, 1849, *Vanderpool a. Tarbox*, 7 *N. Y. Leg. Obs.*, 150.)

The provision giving leave to amend, of course, *without costs*, applies only where the first pleading has been regular. If the opposite party has moved to set aside the first pleading for an irregularity which is cured by the amendment, the party amending must pay costs, even if his amendment is in time under that section. (*Supreme Ct., Sp. T.*, 1850, *Williams a. Wilkinson*, 9 *N. Y. Leg. Obs.*, 186; *Supreme Ct.*, 1850, *Gould a. Chapin*, 5 *How. Pr.*, 358.)

The complaint was for goods sold and delivered, for work and labor for the use and keeping of two cows, and damages for a breach of contract in regard to the letting of the cows, and demanded judgment for \$500. The defendant answered; the cause was referred, and the referee found for the plaintiff \$100, as being the amount at which the parties had compromised their controversies, and which amount it appeared the defendant had promised to pay. The defendant appealed from the judgment, and it was reversed, and a new trial ordered. The plaintiff now moved to amend the complaint so as to claim a recovery upon an agreement to pay \$100 in compromise of disputed claims.

Held, that the amendment was allowable; but that the only terms that would be just in such a case were to require the plaintiff to make the defendant whole by paying all the legal taxable costs to which he had put the defendant by suing on a claim to which the defendant had a good defence, and the plaintiff no just right of recovery. (*Supreme Ct., Sp. T.*, 1856, *Prindle a. Aldrich*, 18 *How. Pr.*, 466.)

Plaintiff was permitted to amend on the trial, by striking out the name of one

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FORBES' CASE.

*Before Hon. Josiah Sutherland; Supreme Court, Chambers,
August, 1860.*

HABEAS CORPUS.—VAGRANTS.

Proof that the prisoner was a common prostitute and idle person does not authorize her commitment and conviction as a vagrant. It is only a certain class of prostitutes—viz., those without employment—who are declared by statute (1 *Rev. Stat.*, 633; *Laws of 1833*, 9, ch. 11) to be vagrants.*

Habeas corpus to inquire into the detention of Catharine Forbes, who was imprisoned on a summary conviction as a vagrant.

of the defendants, who appeared to be not a proper party, on condition that plaintiff pay or secure his costs forthwith, and allow the trial to stand over, if the other defendant desired it. (*Supreme Ct., at Circuit*, 1848, *Bemis v. Bronson*, 1 *Code R.*, 27.)

On granting plaintiff's motion to strike out the name of a defendant who proves not to be a proper party, the terms should be such as to indemnify the remaining defendants for the expense to which they will be subjected by the amendment. [3 *How. Pr.*, 296.] (*Supreme Ct., Sp. T.*, 1856, *Turner v. Hillerline*, 14 *How. Pr.*, 231.)

Though the plaintiffs might be permitted to amend, or file a supplemental complaint, bringing in the necessary parties, although they had, after knowledge that such parties were necessary, proceeded to a judgment, and had litigated an appeal,—yet this should not be done, except on terms of payment of all costs since the time when the plaintiffs were first informed of the facts, which made the bringing in of other parties necessary. (*Supreme Ct., Sp. T.*, 1859, *Sage v. Mosher*, 17 *How. Pr.*, 367.)

After report of a referee for a greater sum than is claimed in the complaint, the complaint should not be amended by increasing the amount of damages claimed, except upon terms of consenting to a new trial, and paying costs of the former trial, and of opposing the motion. [8 *Wend.*, 356; 2 *Seld.*, 97.] (*N. Y. Superior Ct.* (1854?), *Bowman v. Earle*, 3 *Duer*, 691.)

If the judgment gave defendant an extra allowance, but that judgment has been set aside, and a new trial ordered, the court, on permitting plaintiff to amend his pleading in substantial respects, will not require payment of the allowance as terms, but only payment of taxable costs. (*Supreme Ct., Sp. T.*, 1855, *Troy & Boston Railroad Co. v. Tibbits*, 11 *How. Pr.*, 168.)

* Compare Gray's Case, *Post*, 56.

The facts are stated in the opinion.

SUTHERLAND, J.—The warden of the city prison returns to the writ of habeas corpus allowed by me in this matter, a copy of the warrant of commitment under which the prisoner was received into his custody, and by virtue of which she is held and detained.

After hearing counsel, and after giving to the subject the most serious consideration called for, as I thought, by its great importance and public interest, I have come to the conclusion that the warrant of commitment on its face is absolutely void, and that the prisoner must be discharged, on the ground that it does not appear on the face of the commitment that the prisoner has been duly convicted of being a vagrant, or indeed, that she has been convicted or committed for any offence or crime whatever.

The question on the face of the commitment arises in this matter. The warrant of commitment (which is under the hand and seal of Mr. Quackenbush, one of the police-justices of this city), not only in due form recites the conviction of the prisoner on competent testimony, of being a vagrant; but proceeds to state and specify the facts, circumstances, or conditions, which made or constituted the prisoner a vagrant, and on competent proof of which it must be assumed that the committing magistrate determined that the prisoner was a vagrant. The words of the commitment are: "Whereas Catharine Forbes stands charged, and is on competent testimony made before me, lawfully convicted of being a vagrant—in this, to wit: *That she is a common prostitute* and idle person, of which conviction a lawful record in due form has been made and filed, and it appearing to me for the cause aforesaid that she is a vagrant within the meaning of the statute, &c.; I do — and determine that she be committed," &c.

The commitment, then, on its face, presents this question: did competent and satisfactory testimony that the prisoner was a common prostitute and idle person authorize her conviction and commitment as a vagrant? There is no such common-law offence or crime as vagrancy or idleness, or vagrancy and idleness. By certain statutes all persons coming within a certain description defined and declared by the statutes, are declared to be vagrants,

and provision is made for their trial, conviction, and imprisonment. We have two such statutes. By the Revised Statutes (2 *Rev. Stat.*, 879, 5 ed.), all idle persons, who, not having any visible means to maintain themselves, live without employment; all persons wandering about and lodging in taverns, groceries, or beer-houses, outhouses, market-places, sheds, or barns, or in the open air, and not giving a good account of themselves; all persons wandering abroad and begging, or who go about from door to door, or place themselves in the streets, highways, or other public places to beg or receive alms, shall be deemed vagrants. Common prostitutes as such are not named in this statute, and although they may be, and are, perhaps, most likely to be, or to become vagrants within the description of the statute, yet it is plain if a common prostitute is lawfully convicted of being a vagrant under this statute, she must be so convicted, not merely on her confession, but on competent testimony that she is a common prostitute or an idle person, or that she is both a common prostitute and an idle person. This statute does not declare common prostitutes as a class or by name to be vagrants, nor does it declare all idle persons to be vagrants, but only such idle persons as live without employment, and yet have no means to maintain themselves. By an act passed January 23, 1833 (*Laws of 1833*, 9, ch. 11), which from its title and provisions would appear to be confined in its operations to the city of New York. "All common prostitutes who have no lawful employment whereby to maintain themselves," are declared vagrants. It is presumed that the prisoner, Catharine Forbes, was arrested and convicted under this act; but by this act common prostitution is neither defined nor declared to be a crime. By the act a certain class or description of common prostitutes are declared to be vagrants. Every word which defines this class, or makes a part of this description, is material and important.

The magistrate in acting under the act, had no right to disregard one word of that description. He has no right, I think, to say or determine that a common prostitute is a vagrant within this act merely because she is also idle, or an idle person, without proof of any other fact or circumstance. To be a vagrant within this act, the common prostitute must be without any *lawful employment whereby to maintain herself*. These words

imply, I think, something more than being idle, or in an idle condition; and probably something more even than habitual idleness. They imply, I think, a want of any lawful business occupation or means whereby to maintain herself. It is plain that, substantially, the same words as used in the Revised Statutes in describing the kind or class of idle persons declared to be vagrants, mean something more than mere idleness, otherwise the statutes would have declared all idle persons to be vagrants. The object of this act is not to punish common prostitutes as a sin or moral evil, or to reform the individual, but to protect the public against the crimes, poverty, distress, or public burdens, which experience has shown common prostitution causes or leads to.

These statutes—declaring a certain class or description of persons vagrants, and authorizing their conviction and punishment as such; as well as certain statutes declaring a certain class or description of persons to be disorderly persons, and authorizing their arrest as such—are in fact rather of the nature of public regulations to prevent crime and public charges and burdens, than of the nature of ordinary criminal laws prohibiting and punishing an act or acts as a crime or crimes.

If the condition of a person brings him within the description of either of the statutes declaring what persons shall be esteemed vagrants, he may be convicted and imprisoned, whether such condition is his misfortune or his fault. His individual liberty must yield to the public necessity or public good; but nothing but public necessity or the public good can justify these statutes, and the summary conviction without a jury in derogation of the common law authorized by them. They are constitutional, but should be construed strictly, and executed carefully in favor of the liberty of the citizen. Their description of persons who shall be deemed vagrants, is necessarily vague and uncertain, giving to the magistrate in their execution an almost unchecked opportunity for arbitrary oppression or careless cruelty. The main object or purpose of the statutes should be kept constantly in view, and the magistrate should be careful and see, before convicting, that the person charged with being a vagrant is shown either by his or her confession, or by competent testimony, to come exactly within the description of one of the statutes (see opinion of Edmonds, Circuit Judge,

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in *The People v. Phillips*, 1 *Park. Cr.*, 95, &c.). In this case there is not the least ground for supposing that the committing magistrate's proceedings were not in good faith, and with the sole view of conscientiously discharging his duty. But no record of the conviction has been produced, and by an affidavit made in this matter it appears probable that none has been filed in the clerk's office of the Court of Sessions, as required by the act of 1833, and the act of April 10, 1835, amending it; and I can therefore only look to the warrant of commitment to see whether the prisoner was lawfully convicted of being a vagrant, or of any crime or offence. For the reasons above stated, I think the commitment on its face does not show that the prisoner was lawfully convicted of being a vagrant, or of any offence or crime. No statute of this State has yet declared common prostitution or idleness to be a crime, and I think, for the reasons above stated, that the determination of the magistrate that proof that the prisoner was a common prostitute and idle person authorized her conviction as a vagrant was erroneous.

The prisoner, therefore, must be discharged.

It will not be necessary to examine the other question raised in this matter, to wit: whether the prisoner should be discharged on the ground that no record of conviction has been filed, as required by the acts before referred to.

 GRAY'S CASE.

Before the Hon. Daniel P. Ingraham; Supreme Court, Chambers, September, 1860.

HABEAS CORPUS.—COMMITMENT.—VAGRANTS.

The practice of reviewing commitments upon habeas corpus is not to be encouraged.

A commitment for vagrancy should state that the person is a vagrant; but need not state all the particulars necessary to make out the offence.*

* Compare *Forbes' Case*, *Ante*, 52.

Gray's Case.

Habeas corpus to inquire into the detention of Wm. M. Gray, who was imprisoned on a summary conviction as a vagrant.

The facts are stated in the opinion.

INGRAHAM, J.—The prisoner was committed by a police-justice, on the ground of his having been convicted of being a vagrant, viz.: an idle person not having visible means to maintain himself, and an habitual drunkard. He is now brought before me on habeas corpus, and his discharge asked for on the ground that the commitment is not for any offence provided by statute.

The practice of reviewing convictions before justices on habeas corpus is not to be commended. The statute permits another mode for correcting the errors of the justice, which should be resorted to. If the commitment is regular, and the justice has jurisdiction of the matter, no relief should be afforded in this proceeding.

It is apparent, therefore, that I should only inquire whether the justice had jurisdiction of the prisoner, for an offence defined in any of the statutes of the State. I think there can be no doubt on both points. The jurisdiction of the justice making the commitment is not disputed.

The offence of which the prisoner was convicted is stated as follows, viz.: "Who stands charged before me with being a vagrant, viz.: an idle person, who, not having visible means to maintain himself, and is an habitual drunkard." The confusion of the sentence arises from the use of a printed form of commitment, and erasing part, so as to insert another grade of the same offence as provided by the statute.

By the Revised Statutes (vol. 1, 602), an idle person, who, not having means to maintain himself, lives without employment, is to be deemed a vagrant. In the present case the words "lives without employment," are erased from the commitment.

By the act of 1833 (*Laws of 1833*, 9, ch. 11), "A person, who, being an habitual drunkard, is destitute and without visible means of support," is to be deemed a vagrant.

In this case the words "is destitute" are stricken out.

If it were necessary that all the matters required to be proven should be stated in the commitment, then neither offence is fully

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stated therein. But I am of the opinion that it is not necessary that the commitment should state all the particulars necessary to make out the offence. The offence is being a vagrant. The justice states that the prisoner has been charged with being a vagrant, and was convicted on competent proof.

This is sufficient to show the offence charged and the conviction. (See *People v. Moore*, 3 *Park. Cr.*, 465.)

In a commitment for petit larceny it is enough to state that offence without reciting the goods stolen, or the owner of the property. In *The People v. Cavanagh* (2 *Park. Cr.*, 660), the general term of the second district held that a commitment which recited that the prisoner was convicted of a misdemeanor was sufficient, and a more particular statement of the offence need not be made.

Even if the contrary rule had been adopted prior to 1855, since that time the mode in which the record of conviction is directed to be made up, would render such recital unnecessary.

That act (*Laws of 1855*, ch. 268) directs the form of the record of conviction to be in this respect, as follows: "That the prisoner was brought before the justice on a charge of being a vagrant, and that upon diligent inquiry, &c., it appearing that the said prisoner is a vagrant within the provisions of the statute, I, the said justice, did so adjudge," &c.

The commitment is sufficient if it follows the record; and when it is not required that the justice should insert in the record the particular grounds on which the charge of vagrancy is based, it cannot be necessary to recite them in the commitment.

The words defining the particular causes of vagrancy may therefore be regarded as surplusage, and the charge of being a vagrant, and being committed thereof, is sufficient.

The prisoner is not without means of reviewing the judgment appealed from, and I do not feel at liberty under this proceeding to review that trial. At any rate, I am not willing to discharge a prisoner because the parts necessary to be proven are not recited in the commitment.

I concur with the views of Mr. Justice Sutherland, in the case of Catharine Forbes, so far as they are expressed as to what is necessary to be proven in order to make out the offence; and unless, on a review of the case, it should appear that all the

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facts necessary to constitute the offence are proven, the conviction should be reversed ; but as I do not consider that all such facts should necessarily be recited in the commitment, I feel bound to remand the prisoner, on the ground that the commitment is regular on its face, and the decision of the justice cannot be reviewed in this proceeding.

The prisoner must be remanded.

PEOPLE *v.* SHEPARD.

New York Oyer & Terminer, January, 1860.

COURT OF SESSIONS.—REMITTING CAUSES FOR TRIAL.

It is the duty of the Court of Sessions to send to the Oyer and Terminer all indictments for offences which they cannot try ; and they have power to send to that court any case which they can try, if they deem expedient.

If an indictment has been once tried in the Court of Sessions, the second trial should be had in the same court, unless some reason is shown to the Oyer and Terminer for allowing the trial to be had in the latter court.

Motion to remit an indictment to the general sessions.

The facts are stated in the opinion.

INGRAHAM, J.—In this case a new trial was ordered by the Court of Appeals, and the case was sent back to the Court of Sessions for trial. At the last term of that court, an order was made, on the application of the district-attorney, sending the indictment for trial to the Oyer and Terminer. A motion is now made that the indictment be remitted for trial to the Court of Sessions.

The counsel for the prisoner urges in support of his motion, that since the passage of the act of 1855, the prisoner has a right to insist upon a trial in the sessions where the indictment was found, and that the district-attorney and Court of Sessions cannot, by sending the indictment to the Oyer and Terminer, deprive the prisoner of the right which the statute gives him

to a writ of error as a matter of right, and to a review of the finding of the jury upon the facts, if the prisoner should be convicted.

The act of 1855 does give to a prisoner convicted in the sessions of a capital offence, such a right, but such a right does not depend upon the finding of an indictment in the sessions. The statute allows this only in the case of a conviction in that court, and the provisions of law as to the sending of indictments from that court to the Oyer and Terminer for trial, are in no way affected by that statute.

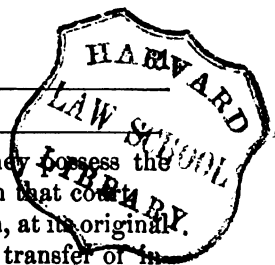
By the statute (2 *Rev. Stat.*, 2 ed., 303, § 6), the Court of Sessions was directed to send to the Oyer and Terminer all indictments for offences, which at the time of the passage of the statute were not triable therein, to the Oyer and Terminer, and at that time no capital case could be tried in that court.

Since the law has been so altered as to give that court the power to try indictments for all offences punishable with death, the obligatory part of those provisions, which compelled the court to send such indictments to the Oyer and Terminer, has of course ceased to be operative; and if this were the only authority for sending indictments from the sessions, there might be some doubt whether, under that section, the indictment could properly be sent to this court for trial; but the 7th section on the same page gives to the sessions a discretionary power to send to the Oyer and Terminer all indictments for offences triable in the sessions, which shall not have been tried and determined, and provides for the trial of such cases in the sessions if the Oyer and Terminer should remit such indictments again to the sessions without trial.

The provisions of this section are ample to authorize the sending of all indictments found in that court to the Oyer and Terminer, and if the enlargement of their jurisdiction has any effect to limit the power of the court under the 6th section, the same cause would extend the operation of the 7th section. The two sections, taken together, were evidently intended to compel the sessions to send to the Oyer and Terminer all indictments for offences which they could not try, and to give to that court a discretion to send any case which they could try to this court, if they deemed it expedient so to order; and notwithstanding the passage of the act of 1855, extending the jurisdic-

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tion of that court, I am of the opinion that they possess the same power now as to all indictments pending in that court.

The intent of the Legislature in the 7th section, at its original passage, was probably to direct a more general transfer of indictments by the sessions to the Oyer and Terminer, than is now supposed.

In England, when the Court of Oyer and Terminer and Jail Delivery was held in any county, that court had the entire control of the criminal business of the county during its sessions, relating to prisoners in jail wherever indicted (4 *Black.*, 270); and on the organization of those courts in this State the same powers were given. By the act relating to those courts, as revised in 1813 (1 *Rev. Stat.*, 336, §§ 16, 47), such jurisdiction was continued.

The statutes regulating courts of sessions (2 *Rev. Stat.*, 150), not only made it obligatory upon the sessions to send to the next Supreme Court or Oyer and Terminer the indictments for offences not triable by the sessions, but by section 3 that court was directed to send all indictments against prisoners in jail, not heard or determined, to the next Court of Oyer and Terminer, and with provision for remitting them back to the sessions if not tried during that court.

The object of these provisions was, undoubtedly, to relieve the prisoners during the sitting of the court, as far as possible, and entire jurisdiction for that purpose was given to the court. In the Revised Statutes (vol. 2, 209), this section was so altered as to make it permissive, and not obligatory on the sessions, to send all indictments to the next Oyer and Terminer, whenever it was to be in session, but in other respects the power and authority remain the same.

I have no doubt of the authority of the Court of Sessions, under these provisions, to send to the next Court of Oyer and Terminer any indictment found in that court, not heard and determined as fully as might have been done before the act of 1855.

In the present case, however, there are other reasons why I deem it proper to remit this case to the sessions for trial. The indictment was originally tried in that court. The Court of Appeals have granted a new trial, not for any errors of law, but because they thought the verdict of the jury was contrary

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to the evidence. They sent it back to that court for trial. No reason is shown why the case should not be again tried in that court. The Legislature have conferred upon the sessions authority to try such cases; and although in cases where an indictment for an offence punishable with death, found in that court, is removed into this court before any trial has been had, I should not hesitate to retain the same for trial here; yet, under the peculiar circumstances of this case, I think, unless some good reason is shown therefor, the new trial should take place in the same court where it was previously tried.

There are several cases now pending in this court for trial, which will require all the time of the court to dispose of them within the period allowed for its session; and as no reason whatever is stated by the district-attorney, to show the necessity of the trial here, in this case, I am of the opinion that the motion to remit the indictment to the sessions should be granted.

STELLE a. PALMER.

New York Superior Court; Special Term, August, 1860.

ARREST.—EXECUTION AGAINST THE PERSON.

After an order of arrest has been discharged on motion, the defendant is not liable to arrest on execution against the person, though on his default at the trial a special verdict is found, stating that he was guilty of the fraud charged in the complaint.

Motion to discharge execution against the person of defendant.
The facts are stated in the opinion.

HOFFMAN, J.—The defendant was arrested, by order, on the 4th day of August, 1858, upon a complaint supported by an affidavit, which stated his being employed by the plaintiff as an agent and broker to invest moneys upon stocks and other good securities, in order to obtain a larger rate of interest than a savings-bank paid him. That the defendant made repeated

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representations of his own responsibility, as well as knowledge, and the plaintiff advanced him moneys from time to time, which were invested in certain securities. Other allegations of deception were made, but chiefly that some of the securities had been long in the defendant's hands, were utterly worthless, and were palmed off by him as the plaintiff's money, knowingly and fraudulently.

On the 7th of September, 1858, this order of arrest was discharged upon hearing and affidavits on each side, and without costs.

On the 18th day of April, 1860, the action came on to be tried before a jury, the defendant making default. The following is a history of the proceedings on such trial:

The jury found a general verdict and special findings under section 261 of the Code.

The court charged the jury, who say that they find a verdict for the plaintiff against the defendant for \$2,598.24, and they answered the following questions as follows:

Q. Did the plaintiff, at the request of the defendant, between the first day of February, 1857, and the 8th day of July, 1857, intrust to the defendant the moneys of the plaintiff? *A.* Yes.

Q. To what amount? *A.* \$5,730.59.

Q. In what capacity was the defendant employed by plaintiff? *A.* As broker of and for plaintiff to loan the money upon good and satisfactory security.

Q. Did the defendant invest the money so intrusted to him upon good and satisfactory security? *A.* Not the whole.

Q. What amount did he not so invest? *A.* \$2,375.

Q. What did the defendant do with the same? *A.* He converted that amount to his own use on the 12th day of May, 1858, and has refused to render to plaintiff a just and true account of his disposition of that amount, viz., \$2,375.

On this the following judgment was entered:

This action having been brought on for trial in its regular order on the calendar at a special term of the court, on the 18th day of August, 1860, and the defendant having been called and failing to appear, his default was entered, and thereupon a jury having (on motion of the counsel of the plaintiff) been impanelled, chosen, tried, and sworn, found a verdict for the said plaintiff against the said defendant for the sum of \$2,598.24

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damages, &c., and having further found that the plaintiff, at the request of the defendant, between the first day of February, 1857, and the 10th day of July, 1857, intrusted to the said defendant the moneys of the plaintiff to the amount of \$5,730.59, and that said moneys were intrusted by the said plaintiff to the said defendant as the broker of and for said plaintiff to loan the same upon good and satisfactory security, and that the said defendant did not invest upon good and satisfactory security \$2,375 of said money as intrusted to him, but converted that sum (*viz.*, \$2,375) to his own use on the 12th day of May, 1858, and did not pay the same to the plaintiff, and has refused to render to said plaintiff a just and true account of said last-mentioned amount. And on this 28th day of April, 1860, the sum of the costs of the said plaintiff, besides necessary disbursements and fees of officers allowed by law, are adjusted at the sum of \$108.13 (after two days' notice of such adjustment to the defendant and on motion of Francis Byrne, attorney for said plaintiff). It is adjudged by this court that the said plaintiff recover against said defendant said sum of \$2,598.24, being the amount of moneys received by said defendant from the said plaintiff, as the broker of and for said plaintiff, including interest to the date of this judgment (and which said money said defendant converted to his own use), and also said sum of the costs, &c., being \$108.13, which, in the aggregate, amounts to the sum of \$2,701.37, and judgment is hereby rendered for the said plaintiff, Lewis D. Stelle, against the said defendant, Charles S. Palmer, for the said sum of \$2,701.37, accordingly, &c., &c.

An execution against the property being returned unsatisfied, an execution against the person has been issued, upon which the defendant has been taken and imprisoned. That execution he now moves to discharge.

In *Kendenburg & Buys v. Morgan* (18 *How. Pr.*, 469), Chief-justice Bosworth examined the subject very fully, and particularly the effect of the 288th section. The case itself was of an action on promissory note by payee against the maker. No order of arrest has been made. An execution on the judgment against property being returned unsatisfied, the defendant was arrested on an execution against his person, which he moved to set aside, which motion was granted. The chief-justice said :

"If the record of the recovery show a cause of action established, which *per se* gives a right to hold to bail, then the existence of such facts is determined by the record itself. In such a case, the decisions are quite uniform that a *ca. sa.* may be issued, though no order to hold to bail had been procured. If the right to hold to bail is wholly independent of the cause of action, then, whether the case be one in which the defendant might have been arrested, as provided in sections 179 and 181, must be determined before judgment by obtaining an order of arrest, and on the motion to vacate it, if the propriety of such order be not submitted to.

If we analyze the complaint, it will appear that for the purpose of a recovery of the money, nothing more was necessary than a statement of the funds advanced to or deposited with the defendant, and his admission that the sum demanded remained actually due, and that payment of such sum had been required and refused. Nothing in the complaint relating to the fraudulent practices which justified an order of arrest, were necessary in it.

The reasoning of Mr. Justice Hogeboom, in *Humphrey v. Brown* (17 *How. Pr.*, 481), appears to me deserving much consideration. A defendant who suffers a default may be deemed to admit only what is essential or material to warrant a recovery. It does not follow that because allegations of fraud are unnecessarily in the complaint (which perhaps would be stricken out on motion), that he admits the truth of such allegations. Those allegations, if sworn to, may be the basis of an order, unless controverted, but do not sanction an execution without an order, after judgment by default. This reasoning is stronger when applied to a case like the present, in which the question of a liability to arrest has been once judicially passed upon, and the defendant discharged. The question is a novel one, and not free from doubt. But, in my opinion, the defendant was justified, after his discharge, in considering that all which could be regularly tried upon the issues was his liability for the demand. As he had no defence to this, he was warranted in not appearing.

The execution must be discharged.

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THE PEOPLE AND TAYLOR *v.* MAYOR, &c., OF N. Y.*Supreme Court, First District; Special Term, July, 1860.*COLLUSIVE JUDGMENT.—MOTION.—AUTHORITY OF ATTORNEY.—
COUNSEL TO THE CORPORATION.

On a motion made by the Corporation of the city of New York, or on one made under the act of 1859 by the comptroller, to set aside a judgment against the Corporation, on the ground of collusion, fraud, and irregularity, the court should not inquire into the merits of the action, nor be influenced by considering whether opening the judgment would result in gain or in loss to the defendants. Such motions are founded on a mere matter of right, resting on the existence of the collusion, fraud, or irregularity.

Although stipulations made by the attorney, pertinent to the matters intrusted to him, are binding upon the client, though made without special authority; yet acts done outside of the matter committed to his charge are not binding,—*e. g.*, a stipulation not to appeal,—and where the attorney is unable to respond in damages, the court will relieve the client, preserving the other party from loss. The right of appeal cannot be taken away without the suitor's consent. So of a stipulation not to move for a second trial, under the statute, in an action for lands.

The counsel to the Corporation of the city of New York has no larger powers, as such, to bind his clients, than those connected with the ordinary relations of attorney and client.

If a judgment is based upon the fact that a former judgment is conclusive upon the parties, it should be set aside on motion when the former judgment has been set aside.

Motion to set aside judgments.

These were motions made by the corporation counsel, and by the comptroller of the city, proceeding under the Laws of 1859, ch. 489, § 5, to set aside three judgments obtained against the city. The first judgment was in a suit brought, in which the People and Taylor & Brennan were plaintiffs, to recover from the city and its lessees the possession of lands. The proceedings in this action are recounted in the opinion of the court. The second judgment was in an action brought by Taylor to recover damages for mesne profits, he having procured from the commissioners of the land office an extension of

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the lease. The third judgment was in an action by Taylor & Brennan to recover damages for back rents on the first lease.

Wm. Curtis Noyes and *John McKeon*, on behalf of the comptroller; *Greene C. Bronson*, *H. H. Anderson*, and *Gilbert Dean*, on behalf of the corporation;—for the motion.

John H. Platt and *J. W. Edmonds*, for plaintiffs, Taylor & Brennan; *Wm. M. Evarts*, for The People;—opposed.

INGRAHAM, J.—The defendants, The Mayor, &c., of the city of New York, move to set aside the judgments entered in these cases, and all executions and proceedings thereon, and all proceedings in the action No. 1, after the order of Justice Roosevelt of 13th July, 1859, and all stipulations to refer, and subsequent proceedings in the other actions and for other relief.

These motions come before me in a twofold aspect.

The comptroller, under the act of 1859, moves to set aside the proceedings upon the allegations of supposed collusion in obtaining the judgments, or that they were founded in fraud.

The counsel for the Corporation joins in the application on behalf of the city, and asks to have the proceedings vacated and set aside, not only for the same causes stated by the comptroller, but for various other grounds, which will be referred to by me herein.

In the decision of these motions, therefore, it may be necessary for me to examine, not only the supposed grounds of collusion and fraud, but the questions which arise as to the powers and authority of the corporation counsel, and his proceedings in the progress of these cases prior to judgment.

The course of proceeding in the first action was certainly not that of ordinary prosecutions, involving a large amount of property which depended as to title upon an examination of ancient documents, and which was claimed by both the parties to the controversy representing the State and city; it was not, under ordinary circumstances, to be expected that the litigation would end without a full examination before the courts as to the matters in controversy, until finally settled by the Court of Appeals; and yet at the present time, as the case is now pre-

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sented to the court, the defendants are concluded upon all the matters which have been raised in this cause, without the opportunity of review or of a new trial as allowed by law.

I propose to examine, first, the proceedings of the counsel as resting upon the authority which he possesses in representing the city, and whether such proceedings and stipulations are binding upon the Corporation. Before doing so, however, I will notice some matters which have been urged before me as grounds for granting this motion.

On behalf of the city, the corporation counsel has examined at length the proceedings of the commissioners of the land office in granting the lease of the premises originally to Taylor & Brennan, the lessees, and impugning their motives, both on account of the small amount of rent to be paid and the haste with which the grant was made.

In reference to that it is sufficient for me to say, that with such proceedings I have nothing to do on this motion; whether the commissioners did or did not honestly and faithfully discharge their duties is a matter between them and the State. If the price received by them for the lease was inadequate, the State, and not the courts, is to call them to account. If there was any fraud in making the grant, or if the lease was void as prohibited by law, or for any other cause, such matters may be grounds of defence in the action, but are not to be examined in these motions.

The State must protect its own rights against its own officers, and it matters nothing to the city of New York in resisting claims to this property, that a lease has been given to Taylor & Brennan by the commissioners for a sum far below its value. Such a defence would form no ground for their claim to the possession of the land, if they could show no title thereto better than the State had, and that title was to be examined and ascertained on the trial of the cause.

For this reason, also, I do not deem it within my duty, on this motion, to examine who had the real title to this property, or whether the State owned it or the city; such questions must, necessarily, be examined and decided in a more formal and deliberate manner than could be done on the motion, and they have been examined and decided when this cause was tried. That decision should only be reviewed on appeal, if there are

no reasons for opening the judgments in the other grounds upon which this motion is based.

I refer, in those remarks, to the suggestions which were made before me by most of the counsel, as to the title of the property in controversy, and the claims urged on both sides as to the right of each to hold the same.

It may become necessary hereafter to inquire as to the authority of the commissioners in other respects as to matters involved in this controversy; but of that I will not speak now.

These views, above expressed, also render it proper for me to add that, in the decision of these motions, I have nothing to do with the consequences of loss that might follow to the city, if the judgments should be opened, or the gain if the judgments are suffered to stand. I have no discretion to exercise, and no consideration of policy should influence me in regard to the final results of this litigation. If the judgments should be opened, and the result be a loss to the city of more land or greater damages, the officers who applied for the granting of this motion, have undoubtedly acted, and, I cannot doubt, are acting as they deem best calculated to promote the city's interest.

These motions are founded on a mere matter of right—if the judgments have been collusively obtained, or if the proceedings by which those judgments have been entered up against the city have been irregular and without authority, the defendants can ask, as a matter of right, to have them vacated and set aside.

If there has been no such fraud, collusion, or irregularity in the proceedings, it is my duty to sustain them, whether I should think the title to be defective or not; or whether, in a different form, on a review of the proceedings upon the trial, the same could be sustained or not. The law has provided a mode of appeal on those questions, and in my judgment they should not be examined in any other. Originally, the Corporation of the city and the tenants of the ground sought to be recovered, were made parties defendant in this action.

On demurrer by the defendants to the complaint, the complaint was sustained, but the justice, in his opinion, intimated that the Corporation was improperly made a party, and that no cause of action existed against the city Corporation for with-

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holding the premises was stated in the complaint. (People a. The Mayor, &c., of New York, 28 *Barb.*, 240; S. C., more fully, 8 *Abbotts' Pr.*, 7.)

Upon this decision, made in December, 1858, an order was entered requiring all the defendants to answer.

In February succeeding, on a consent signed by the corporation counsel and the attorney for the plaintiffs, Taylor & Brennan, the action against the city was discontinued, and an order duly entered. The costs of the defendants, the mayor, &c., were also paid.

On the 9th February, the counsel informed the mayor that such discontinuance had been entered.

After the entry of this order, the plaintiffs proceeded in the cause against the tenants, and took a judgment against them by default for the possession of the premises and for the recovery of a large amount of damages.

Upon the discontinuance as to the Corporation coming to the knowledge of the mayor, he communicated to the Common Council an application to him from the tenants, asking to have them protect the tenants in their possession, and thereupon a resolution was passed on the 15th of February directing the corporation counsel to appear and defend the tenants in that action, and to take such other measures as would effectually protect the interests of the city in the said property and the suit affecting the same.

After the passage of this resolution of the Common Council, the corporation counsel was not substituted as attorney for the tenants until the 25th of May, the day after the judgment had been taken against them by default.

In June a motion was noticed to have the judgments set aside, the receiver discharged, the possession restored, and the funds in the hands of the receiver paid over to the Corporation. On this motion the corporation counsel appeared, and in July Mr. Justice Roosevelt granted the motion setting aside all the proceedings, restoring the possession of the property to the city, and ordering the receiver to account and pay over all moneys received by him to the Corporation. This order was entered on 13th July, but instead of carrying it into effect a stipulation was entered into in September ensuing between the counsel of the Corporation and the attorney of the plaintiffs, that the

Corporation should be restored as defendants, that an answer should be put in forthwith, that the trial should be had at the then circuit, if possible, and consenting to have the cause noticed without issue.

The stipulation also restored the receivership, left the moneys in his hands, to abide the final determination of the case, and made all orders theretofore entered, to conform thereto. It also contained admissions seriously affecting the rights of the Corporation.

Within a day or two thereafter, the case was tried before Judge Potter, and a verdict rendered for the plaintiffs.

An appeal was taken by the attorneys for plaintiffs and for the defendants,* and on the 9th November the corporation counsel agreed to withdraw his appeal, on the plaintiffs' counsel stipulating to do the same, and both agreed not to appeal or apply for a new trial within the time allowed by law, which stipulation was carried into effect by the withdrawal of the appeal on behalf of the defendants on the 31st of December, 1859.

The questions which arise on this branch of the motion are in regard to the validity of these stipulations, and the authority of the attorney to make them.

Under ordinary circumstances, the authority of an attorney is limited to his employment. He is authorized by his client to do any thing necessary to the proper management of the action intrusted to him, whether its prosecution or defence.

He may agree to a reference, and it has been held in some cases that he may even consent to an arbitration. (*Holbert et al. v. Parker*, 7 *Cranch*, 436; *Gorham v. Gale*, 7 *Cow.*, 744; *Smith v. Troup*, 7 *C. B.*, 757; *Faveall v. East Railway Co.*, 6 *Dowl. & L.*, 54). It was formerly held that an appearance by an attorney for a party without authority was good, leaving the party to his remedy against the attorney for his damages. (*Denton v. Noyes*, 6 *J. R.*, 296.) But that rule was long ago modified so as to give relief to the party, if the attorney was not fully able to respond in damages. And in *Denton v. Noyes*, Ch. J. Kent said, he was willing to go free then, and in every such case, to let the defendant in to a defence.

In *Meachum v. Dudley* (6 *Wend.*, 514), the rule was settled

* See 10 *Ante*, 111.

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that the court would relieve a party if his attorney was not responsible; and if he was able to compensate in damages, the rule still remained. (*Adams a. Gilbert*, 9 *Wend.*, 499; *Campbell a. Bristol*, 19 *Wend.*, 101.) Later than these cases, a still greater disposition has prevailed among the judges to relieve a party from the unauthorized acts of the attorney. In the English courts these views as to relieving parties now prevail.

In *Bagly a. Buckland* (5 *Dowl. & L.*, 115), the court say: "We are disposed to lay down a different rule, and to confine the liability of the defendant to cases in which the course of proceedings had given him notice of the action. If the plaintiff, without serving the defendant with process, accepts the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence, for the law requires him to give notice to the defendant by serving the writ, and he has not done so."

But while the attorney has all the authority necessary for the conduct and management of the action, and for the collection of the debt, if any, his powers go no further. He has no further or greater authority, even if he thinks it, for the benefit of his client. Thus, he cannot bind his client to an appeal-bond, although he thinks it for his client's interest to appeal. (*Ex parte Holbrook*, 5 *Cow.*, 35.) He has no right to make a compromise for his client. (*Holber et al. a. Parker*, 7 *Cranch*, 436; *Nozan a. Jackson*, 16 *Ill. R.*, 472.) He cannot release the interest of a witness on the trial. (*Murray a. House*, 11 *J. R.*, 464.) He cannot discharge the debt for a less sum than the amount recovered. (*Lane a. Gamage*, 1 *Pick.*, 347; *Crump a. Challis*, 6 *Dowl. & L.*, 48.) He cannot compromise and discontinue a suit brought for land of his clients, in consideration of a conveyance of parts to him. (*Filly a. Miller*, 25 *Penn. S. R.*, 264.) He cannot purchase land sold under an execution issued in the cause for the benefit of and as trustee for his client. (*Beardsley a. Root*, 11 *J. R.*, 464.) He has no authority to discharge the defendant on an execution without receiving payment. (*Simonton a. Banell*, 21 *Wend.*, 362.)

In *Terhune v. Colton* (2 *Stockton R.*, 21), the chancellor of New Jersey says: "I think that the solicitor had not the power to enter into an agreement by which the lien of his client was postponed to a subsequent incumbrance. The authorities are

numerous and very uniform against the authority of an attorney to enter into any agreement of this kind, without being authorized." (See also *Williams v. Smith*, 1 *Dowl. Pr. Cas.*, 632; *Hubbard v. Phillips*, 13 *M. & W.*, 702.)

In *Howe v. Lawrence* (2 *Zabr. (N. J.) R.*, 29), it was held, that such an agreement, made by an attorney or counsel, of matters not necessarily connected with the conducting of the case, would not be sustained.

The stipulations in that case were somewhat of the same character as these in this case, excepting that the intent was to allow another trial instead of preventing any review by the higher court.

The chief justice, in describing the stipulation, says: "The stipulations were that all necessary papers should be filed out of time, that all irregularities in the steps taken should be waived, that the same judgment should be entered in the cases as were entered in that," and other provisions were made after judgment was entered; and in expressing his opinion on the validity of the stipulation, he says: "The stipulation to waive the judgment was not an agreement for the conduct of the cause, it was a deliberate surrender of his client's rights, a surrender which I conceive the counsel had no power to make, and which, if he had the power, justice would never permit to be enforced. * * * Either the agreement must have been entered into by the counsel of the defendant under some misapprehension of its character, in which event it is not his agreement, or it must have been founded on some corrupt consideration, in which event it is utterly void. The high character of the counsel forbids the imputation of fraud or corruption. The alternative remains that the agreement was entered into under some mistake or misapprehension, and ought not to be enforced by the courts."

In *Pike v. Emerson* (5 *N. H. R.*, 303), a contrary opinion seems to have been entertained as to the right of the attorney to stipulate not to bring an appeal, and the court held that while such a stipulation existed, they would grant a motion to dismiss the appeal.

But on examination of that case, it appears that the effect of that decision was that the party must first move to set aside the stipulation if there was any reason why it should not be held

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valid, before he could bring the appeal. The judge says : " The court has the power, without doubt, in case of fraud or mistake, to relieve a party from the effects of such an agreement, but while the agreement remains unimpeached, no appeal can be prosecuted."

The rule confirming relief to the client only to cases of the insolvency of the attorney, has nearly, if not entirely, become obsolete, and the rule adopted to give relief to the party where the act was unauthorized. In *Sharpe v. The Mayor, &c.*, Justice Mullin says : " The recent, and, in my opinion, the more just practice is, for the court to relieve the client, without reference to the responsibility of the attorney, where a proper case for granting relief is established. There is no justice in permitting one party to obtain an undue advantage over another through the neglect or misconduct of that other's attorney. Courts of law are not to be used by parties in perfecting, through the forms of law, the ruin of a party who has employed a negligent or unworthy attorney."

And in 1 New York Ch. R. (554), it is said : " The law will not permit an attorney, through that relation, to make a contract relative to the property in litigation, to the disadvantage of his client."

From these, and other cases which might be cited, it can easily be seen what the duty and authority of the attorney is. He is vested with all necessary power and authority for the management of the case intrusted to him, and for carrying into effect the orders and judgments of the court. If he enters into stipulations pertinent to the matter intrusted to him, he can thereby bind his client. If, in such matters, he acts without special authority, the court will still enforce his acts against his client in the particular business of his employment. If, in so doing, his client is seriously damaged, and he is unable to respond in damages, the court will relieve the party injured, preserving the other party from loss.*

* The authority of the attorney in a cause has been defined as follows :

In general, the attorney on record is authorized by his retainer to do such things as pertain to the prosecution of a suit to final judgment and execution, and to receive the money for which such judgment is recovered, especially, if received within the time in which he might regularly issue execution ; and upon the receipt of the money, to discharge the party, and acknowledge satisfaction of

But his acts done outside of the matter committed to his charge are not binding; and when he undertakes to bind his client, by stipulating as to matters not connected with the action, such agreements are not binding. In the present case, it can

the judgment. [Citing 2 Rev. Stat., 863, § 25; 10 Johns., 220; 8 Ib., 362; 6 Ib., 53; 11 Ib., 464; 7 Cow., 739.] (Stewart *v.* Biddlecum, 2 N. Y. (2 Comst.), 103.)

Under the general authority of an attorney, he may discontinue the cause. His general power does not extend to a *retraxit* or release, but this is because they relate to the cause of action itself, not merely to the remedy. But he may do all ordinary acts in the prosecution of the suit, or in the final disposition of it. (*Supreme Ct.*, 1826, Gaillard *v.* Smart, 6 Cow., 383.)

The general retainer of a solicitor in chancery as such, gives him no authority to employ counsel for his client at counsel fees beyond the allowances fixed by the fee-bill. (*Chancery*, 1835, Matter of Bleakley, 5 Paige, 311.)

An attorney cannot recover of his client fees of counsel associated with him, without proving that he employed such counsel at the client's request, or with his sanction paid such fees. (*N. Y. Com. Pl.*, 1855, Cook *v.* Ritter, 4 E. D. Smith, 253.)

Counsel cannot settle a suit and conclude the client in relation to the subject in litigation without special authority. (*Supreme Ct.*, *Sp. T.*, 1846, Shaw *vs* Kidder, 2 How. Pr., 244.)

A client has no right to control his attorney in the due and orderly conduct of the suit. Where the case is of such a nature as that there can be no doubt in the mind of the attorney, that according to the settled rules of practice, the default will be opened by the court on the usual terms, it is his duty, when applied to for that purpose, to open the default, any directions of his client notwithstanding, and not compel the party to apply to the court. (*Supreme Ct.*, 1828, Anon., 1 Wend., 108.)

Attorney's motion to open default denied, on the ground that defendant had sent to him written instructions not to make the motion. (Derickson *v.* McCarrle, 2 How. Pr., 188.)

A verbal authority to an attorney to appear in a cause, is not authority to release the interest of a witness. (*Supreme Ct.*, 1814, Murray *v.* House, 11 Johns., 464.)

A counsel on the trial of a cause has not authority, as such, to execute a release of a witness, in the name and as the attorney of the party; the latter being absent. (*Supreme Ct.*, 1849, Bowne *v.* Hyde, 6 Barb., 392.)

The attorney of the plaintiff in an execution has authority to direct the deputy sheriff in his proceedings, and may authorize a departure from the regular and ordinary course. (*Supreme Ct.*, 1842, Corning *v.* Southland, 3 Hill, 552. And see Gorham *v.* Gale, 7 Cow., 739.) But, it seems that it is not a part of the duty of the attorney of an execution-creditor, as such attorney, to direct the sheriff in the discharge of his duty under the execution. (Ray *v.* Birdseye, 5 Den., 619; affirming S. C., 4 Hill, 158.)

The attorney to the plaintiff in a suit has no authority, from his general character as attorney, to discharge the defendant from execution on a *ca. sa.*, until the money is paid. An attorney's authority determines with the judgment, or at least with the issuing of the execution within the year. (*Supreme Ct.*, 1811, Jackson *v.* Bartlett, 8 Johns., 361; approved and followed, 1813, Kellogg *v.* Gilbert, 10 Ib., 220; S. P., Simonton *v.* Barrell, 21 Wend., 362.)

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hardly be necessary to ask for evidence that the attorney cannot respond in damages to the city, if the result of these stipulations should deprive the city of its property.

The value of the property is estimated at millions, and no

The ordinary authority of an attorney, in prosecuting a demand, does not authorize him to bid, or to direct another person to bid, in the name of his client, at the sale on an execution. (*Supreme Ct.*, 1814, *Beardsley a. Root*, 11 *Johns.*, 464; 1825, *Hawley a. Cramer*, 4 *Cow.*, 717; 1847, *Averill a. Williams*, 4 *Den.*, 295.)

In analogy to his authority to pursue the appropriate processes by execution, to enforce the collection of the demand, as they existed prior to the non-imprisonment act of 1831, an attorney, under his retainer to collect a demand, is now authorized to demand from the debtor an assignment of his choses in action, and, on refusal, to institute proceedings under the non-imprisonment act of 1831. [20 *Pick.*, 53.] (*Ct. of Appeals*, 1848, *Steward a. Biddlecum*, 2 *N. Y. (2 Comst.)*, 103.)

As between plaintiff and defendant, the attorney's authority, under a general retainer, does not allow him to satisfy the judgment, except upon actual payment in money of the full amount. (*Supreme Ct.*, 1858, *Lewis a. Woodruff*, 15 *How. Pr.*, 589; and see *Benedict a. Smith*, 10 *Paige*, 126.)

The authority of an attorney employed to defend a suit removed by certiorari from a justice's court to the Common Pleas, does not empower him to bring a suit on behalf of his client against the obligors in the bond given upon obtaining the certiorari. As a general rule, the authority of an attorney continues until final judgment is perfected, and no longer. (*Supreme Ct.*, 1848, *Walradt a. Maynard*, 3 *Barb.*, 584.)

That the plaintiff's attorney has no authority to receive payment of the judgment after two years have expired since it was rendered. (*Chautauque Co. Bank a. Risley*, 4 *Den.*, 480.)

An attorney ceases to be such on the death of the client. He is in no sense the attorney of the successors in interest. (*Supreme Ct.*, 1852, *Putnam a. Van Buren*, 7 *How. Pr.*, 81; and see *Beach a. Gregory*, 2 *Abbotts' Pr.*, 203; affirmed, 3 *Id.*, 78; 8 *C.*, *sub. nom.* *Beach a. Raymond*, 1 *Hill.*, 201; *Balbi a. Duvet*, 3 *Edw.*, 418.)

After the death of plaintiff in a judgment, and after the expiration of five years from the recovery of the judgment, a motion was made on behalf of plaintiff for leave to issue execution. The notice of motion and affidavits were entitled in the original cause, and the notice was signed "W., att'y for pl'ff." There was no suggestion of plaintiff's decease, but all the proceedings were in her name, and purported to be on her authority. The motion was granted, execution was issued, and property sold, by direction of plaintiff's executor.

Held, that the execution was no protection to the executor. W. had no authority to act as attorney of the plaintiff. A deceased person can have no attorney. The notice of motion signed by him had no effect, and must be regarded as if unsigned by any one. It imposed on the defendant no obligation to appear and answer the motion. The order, therefore, was void, and the execution also, for the reason that the plaintiff in the judgment was dead. (*Supreme Ct.*, 1856, *Bellinger a. Ford*, 21 *Barb.*, 311.)

The authority of the attorney is not terminated, in the case of judgment passing against his client, until the actual entry of judgment upon the roll. (*Supreme Ct.*, 1841, *Lusk a. Hastings*, 1 *Hill*, 656.)

client should be required to seek for redress to such an extent solely against his attorney, but should be relieved by the court from the danger of loss, so far as to protect his rights in the action.

In this case the attorney is the corporation counsel, elected by the people, and intrusted, by statute, with the management of the legal business of the city; and the inquiry is pertinent to this case, whether he has any larger powers and authority as such to bind his clients, than those connected with the ordinary relations of attorney and counsel.

By the Amended Charter of the City Laws of 1857, ch. 446, sub. 26, the Law Department is organized, having charge of and conducting all the law business of the Corporation, and of the departments thereof, and all other law business in which the city is interested, where so ordered by the Corporation.

And by the Corporation ordinance, organizing this department (124, sub. 9), it is provided that he shall prosecute and defend all actions which may be brought by and against them, &c.

In neither the charter nor ordinances is any power given other than the charge and conducting of actions.

They give him no right to assume the control of the property or interests of the city beyond that which belongs to any attorney or counsel in the ordinary management of suits.

The permanency of the office makes no addition to the powers as attorney or counsel.

I am at a loss to see any authority by which, without process, and without direction from the Corporation, he can make

Under a general authority to collect a note, an attorney has authority to receive a payment of part in money, and the residue in a note at two or three days, of a person of undoubted responsibility. (*Supreme Ct.*, 1849, *Livingston v. Radcliff*, 6 *Barb.*, 201.)

Where a solicitor is employed to procure an assignment of a bond and mortgage, or to invest money on such security, or to receive interest accruing on it, this does not involve a power to receive the principal. The debtor is authorized to infer a power to receive the principal, when the solicitor has possession of the securities, but not when they are retained by the client. But to protect himself on this ground, in making payment to the solicitor, he must show that the solicitor had the securities at the very time when the particular payment was made. (*A. V. Chan. Ct.*, 1845, *Williams v. Walker*, 2 *Sandf. Ch.*, 325; *S. C.*, 3 *N. Y. Leg. Obs.* 204.)

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them parties to suits, either as plaintiffs or defendants, or by which he can deprive them of rights vested in them by statute.

The right of appeal is given by law to suitors, and that right cannot, in my judgment, be taken away without their consent. It is not for him to judge as to their interest in submitting to a decision against them. The Common Council, as the legislature for the city, has alone the right to decide whether they will submit to a decision against them which takes from them a large amount of property; and when the counsel undertook to decide for them, he exceeded his powers, and made a stipulation into which he had no right to enter.

The same remarks apply to the stipulation not to move for a second trial, as provided by the statute in actions to recover possession of land. In this respect, also, he exceeded his powers, and this stipulation was without authority.

Throughout the whole argument of this motion, the acts of the counsel, of the mayor, and of the comptroller, have been referred to by one or other of the counsel, as if their acts bound the city, and made the Corporation liable for such acts and for their admissions in matters not specially intrusted to them by law. I know of no such authority vested in either of these officers. In the discharge of the duties belonging to their departments, they have authority to act; but neither of them has the power to bring actions without authority, to dispose of the property or rights of the Corporation without authority, or to make admissions to bind such Corporation, any more than other persons in the employ of the city government.

It would be almost impossible to form a correct idea of the consequences, if it were ever established that any head of a department had the power, without the authority of the Common Council, to dispose of city rights and property either directly or indirectly; and if the head of the law department can, at his pleasure, make the Corporation a party to suits, and, when a large recovery is had against the city, can stipulate that the city shall not have any means of review or redress, he would possess an absolute control over the city property far beyond that possessed even by the Common Council.

It appears to me that he possesses no such power, and the stipulations were unauthorized and cannot be sustained.

Nor can it be said that the plaintiffs have been misled by any such stipulations. They acted with full knowledge of the facts. It was by their act the Corporation ceased to be defendants; and when the stipulations were entered into, they knew, or were bound to know, that they were not necessary in the conducting of the action, and were not within the authority conferred by law on the counsel.

Whatever might be the rule, if the opposite counsel supposed the defendants' counsel had authority to make such stipulations, no case can be found where, acting with knowledge that such authority did not exist, or had not been conferred by the party, any court has ever upheld such stipulations.

Other considerations might be stated why these proceedings, by way of stipulation, should not be upheld, so as to deprive the defendants of any rights, by way of appeal or new trial, to which they would otherwise be entitled.

From the affidavit of Warburton, it is evident that Mr. Justice Potter, throughout, acted on the supposition that all the questions of law in the case were to be reviewed by the court.

When the motion to dismiss the complaint was made, he denied it, and said: "It is hardly to be expected that a justice at circuit should properly dispose of questions involving such importance. I think the court can best discharge its duty by so trying the case as to leave every question in such a condition as to have it reviewed before another court."

And when the defendants' counsel was submitting to the jury their view as to the title to the property, Justice Potter stopped him, saying: "You may be entirely right, but I have not deemed it so important, except for the purpose of getting the facts before the jury, which way this court shall rule the questions of law."

And, in regard to the summing up, when the counsel were limited to an hour each, Mr. Justice Potter said: "The facts are very limited to go to the jury. The main question will be for the present disposed of by the court, with the expectation that this is only a preliminary step to a final decision of the case."

The judge, in his charge to the jury, repeated these suggestions, and told the jury that the "trial was an incipient step, for the purpose of having this action brought to the highest

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court, so that all the questions to be disposed of may be decided by the court of review."

From these statements, made by the learned justice before whom the cause was tried, it is apparent throughout that he kept constantly in view the re-examination of the case in a higher court, and that his rulings were rather in such a manner as would permit that court to decide the case finally, than with a view to its being terminated before him.

Of that right the defendants have been deprived by the stipulations, and they are thus concluded in a case where the court never ruled as to what was considered the strict rules of law, but in such a way as to get all the facts in evidence, leaving to the court above to correct any errors of law which might have been occasioned thereby.

Under such circumstances, I think no court would be warranted in holding the stipulations binding.

Much stress was placed upon the supposed compliance with the opinions expressed by the judges at different times, in this case, as warranting these stipulations.

The decision of Mr. Justice Sutherland did undoubtedly say that the city and the tenants ought not to have been made jointly defendants. (17 *How. Pr.*, 56; S. C., more fully reported, 8 *Abbotts' Pr.*, 7.) In compliance with that decision, the plaintiff applied to dismiss the action, as to the city, and paid their costs. Of this order entered by the plaintiffs no complaint is made. But that same opinion as clearly stated that no damages could be recovered in that action against the city, and yet the stipulation afterwards made admitted such liability. So, in the opinion delivered by Mr. Justice Roosevelt, he stated that the city had been improperly stricken out as defendants, for want of the consent of the attorney-general. But Justice Roosevelt probably overlooked the authority of the attorney-general to Mr. Van Buren to appear for the State, and the statement of the attorney-general, which was among the papers, that although the action was not commenced by his authority, Mr. Van Buren had acted, and that he had discontinued the action against the city. So far as the attorney-general was connected with the proceeding, this letter presented sufficient evidence of all the assent on the part of the attorney-general which he could give, and his assent to the

ratification of the act might be implied from the statements so made by him. It was probably these facts that led to the omission in the order, as finally settled by the judge, of every thing requiring the Corporation to be made a party. No such order having been made by him, the city was not properly a party. Nor could it, with propriety, have been made a party in any other way than setting aside the proceedings by which the Corporation was discharged, as defendants, and ordering them to demur. No such order was made by the judge, and I am forced to the conclusion that the act of the counsel, in stipulating to put them in as defendants, was unauthorized, and cannot be sustained.

Nor can I think that the opinion of Mr. Justice Roosevelt, that the city should have remained defendants, was the controlling motive for their restoration as defendants, when the same stipulation abandoned every thing which he had ordered to be done, and left the property and funds under the control and possession of the receiver, in direct violation of the order he had made in relation thereto.

My conclusions, therefore, are, that both stipulations are void, and must be set aside; that the Corporation were improperly made defendants after the order dismissing them had been entered, and that all subsequent proceedings against them are irregular, and must be set aside.

From the conclusions that I have arrived at upon this branch of the case, it is not necessary that I should examine very minutely the grounds on which the comptroller's motion alone would rest, viz., collusion or fraud in the claim on which the judgment is founded. I think it proper to say there is no direct evidence of either. If there is any such collusion, it can only be inferred from the proceedings after the decision of Judge Roosevelt. That those proceedings were strange and unusual when so large interests were involved, that the stipulations ought not to have been made, that it was unwise to consent to put in an answer for the city and go to trial within two days, and immediately after the counsel who had been employed in the cause for a long time previously were discharged and new counsel employed, without notice, and without preparation, is very apparent. It would equally need explanation to show why a consent was given to make the Corporation liable, in

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opposition to the decision of Justice Sutherland; why the money in the hands of the receiver was kept there, in express violation of the order of Justice Roosevelt; why these proceedings should be insisted upon, in opposition to the refusal of the mayor to have the answer which had been sworn to by him used in the action; why the appeals should be withdrawn without consulting the Common Council; and why, in like manner, the right of appeal was abandoned, and the right to a new trial, under the statute, stipulated away.

These all show a state of things operating very harshly upon the interests of the city, with little, if any, corresponding advantage.

It is contended that the motives for this course of proceeding may have been to save to the city the strip of forty feet which the jury had stricken out of the plaintiff's claim, and it may have been supposed by the counsel that he had a right to judge of such matters by virtue of his office. If these were the motives that led to the making of the stipulations, they would free the case from the charge of collusion and fraud.

Believing, however, as I do, that the course adopted by him was illegal and unauthorized as to the Corporation, and cannot be sustained, it is not necessary that I should say any thing further on this branch of the case.

The judgment in the second case cannot be sustained if the first is set aside. That was an action of ejectment which should not, in my judgment, have been referred. Whether so or not, the referees found that the judgment, in the action tried before Justice Potter, was conclusive upon them on the question of title.

As the order setting aside that judgment destroys entirely that evidence, I see no propriety in retaining the second judgment. It is based upon proceedings which are set aside, and the court, on every principle of justice, should set aside this judgment, if the first one cannot be sustained.

As to the third judgment, the same difficulty exists. The recovery is based entirely on the judgment in the first action as conclusive upon the question of title. Unless the same recovery should again take place, in that or some other action, the whole right to mesne profits fails; and although the questions as to the right of the plaintiffs under the assignment from the commis-

sioners, and the rule of damages in the action might be reviewed under the appeal taken in this case, still the whole claim is dependent upon first recovering the property and establishing the title thereto. If that has failed, there can be no recovery for the mesne profits until the right of the plaintiffs to the land is settled.

Upon the questions as to title and damages, I do not deem it necessary to express any opinion at the present time.

An order must be entered—

1. Declaring both stipulations, in the first action of the date of September 19, 1859, and of 9th of November, 1859, void, and directing them to be set aside.

2. Setting aside all proceedings subsequent to the 15th February, 1859, discontinuing the action as to the Corporation, so far as relates to them.

3. Directing the order of Mr. Justice Roosevelt, of 13th July, to be carried into effect, excepting as to the receiver.

4. Directing the plaintiffs to refund and pay over to the Mayor, Aldermen, and Commonalty of the city of New York, the moneys received by them from the receiver, under the order of 17th November, 1859, in the same manner as the receiver was directed to pay the same.

5. The writ of possession must also be set aside, and the possession of the land restored to the city as directed by Judge Roosevelt.

6. If the appeal taken by the plaintiffs from the order of Judge Roosevelt is not still in force, the defendant must stipulate to allow such appeal to stand, so that order can be reversed.

7. The order will also direct an accounting by the plaintiffs of the moneys received from the land since they have had the possession, before John T. Hoffman, Esq., a referee appointed therefor, and that the amount found to have been so received, after deducting the expenses of collection, be deposited in the Trust Company, to abide the event of the first action; unless the plaintiffs, within thirty days after the confirmation of the report, give a bond, with sufficient sureties, to be approved by a justice of this court, on notice to the corporation counsel, to refund either the whole of such moneys, if they shall fail to recover judgment, in the first action, or a proportional amount if they shall recover less than the recovery before Mr. Justice

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Potter, in September last. The costs in the first action, on both sides, must abide the event.

The judgments in the 2d and 3d actions are set aside, with all the proceedings therein subsequent to the order of reference, upon payment by the defendants of all costs therein after that order, and with leave to the defendants to apply to vacate the order of reference in those cases, or for such other order in regard to the references as they may deem advisable.

The plaintiffs may amend their complaints in either or all of the actions, and serve new complaints in such manner as they may be advised.

BOWLES *a.* VAN HORNE.

New York Superior Court; Chambers, July, 1860.

DISMISSAL OF COMPLAINT.—NEGLECT TO PROSECUTE.—COSTS.

The fact that defendant has actually noticed the cause for trial, does not preclude him from moving to dismiss the complaint for unreasonable neglect on the part of plaintiff to proceed.

What is such unreasonable neglect.

When, in granting an order dismissing the complaint for plaintiff's neglect to proceed, leave is reserved to him to bring the cause to trial on payment of costs, the costs should include all the costs to which defendant is entitled up to that time.

Motion to dismiss complaint.

HOFFMAN, J.—This is a motion to dismiss a complaint for unreasonable neglect to proceed with the cause.

In *Ray a. Thompson* (1 *Duer*, 636, *Nov.*, 1852), Mr. Justice Bosworth, with the concurrence of all the justices, stated the rule to be, that to entitle a defendant to move a dismissal of the complaint, he was not bound himself to notice the cause for trial, but might make the motion in all cases where the plaintiff had neglected to bring the cause to trial according to the course and practice of the court.

At the time of that decision, the 21st rule of the Supreme Court was in force, and was identical with the present 27th

rule. It had been adopted in August, 1852. In August, 1854, it was repealed, and no similar provision adopted. In August, 1858, the former rule was restored. It is as follows:

"Whenever an issue of fact shall have been joined in any action, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant may move for the dismissal of the complaint with costs.

"If it be made to appear to the court that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court shall permit the plaintiff, on payment of costs, to bring the said action to trial at the next court where the same is triable."

Under the section 27 of the Code, authorizing a dismissal of the complaint in case of an unreasonable neglect on the part of the plaintiff to proceed in the cause, under the rule referred to, and the case in our own court before cited, it is plain that the fact of the ability of the defendant to notice the cause and put it on the calendar, does not preclude him from making this motion. If he is not bound to notice it, his actually doing so himself may not prejudice him. It is the plaintiff's neglect which it is the object of the provisions in question to prevent or punish.

I think, therefore, that the fact of the defendant having noticed the cause for three terms, is not an answer to the present motion, and that the cases holding otherwise do not form the rule in our court. (See *Moeller v. Bailey*, 14 *How. Pr.*, 359.) It deserves notice that in that case Justice Harris notices the repeal of the rule of 1849-52, now readopted in 1858, and decides the case before him mainly on the ground of that repeal.

The affidavit of the defendant's attorney makes out a case within the rule warranting the order.

The plaintiff's attorney shows that he did not put the cause on the calendar for April term, nor file a note of issue, but he says it was through inadvertence in his office or on the part of his clerk. The clerk refused to put it on the calendar, as no note of issue had been filed. He then commenced to prepare papers for a motion for that purpose, but abandoned it on account of the absence of a witness.

He filed a note of issue with the clerk for May, but his note of issue caused it to be placed at the foot of the calendar. It

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remained in the same wrong position through May and June. The clerk refused to correct it, and omitted to apply to the court for the reason of the absence of a witness, and the intended absence of the plaintiff.

The plaintiff, upon the trial in February, had liberty to withdraw a juror. Some irregularity occurred in placing the cause on the calendar for March. It is not necessary, nor perhaps possible, on the papers, to say positively that the plaintiff was in fault.

Looking at the course of the plaintiff's attorney in the most favorable light, it is just possible to hold that his neglect has not been unreasonable. To place a cause on the calendar in a position far below its proper place, and neglect to correct it, is a more serious violation of practice than to omit the act entirely.

I cannot let the plaintiff try his cause, except upon the payment of costs; and these costs I understand to be the whole costs accrued. The 26th rule provides that upon a stipulation the costs to which the defendant is entitled up to that time, must be offered. The previous clause of the 27th rule speaks of a dismissal of the complaint with costs; and the permission to try at the next court, given as matter of favor, "on payment of costs," seems to me to mean the same costs.

The restoration of the rule of 1849, if duly enforced, will be very effectual to render a plaintiff diligent in the prosecution of his action, and relieves a defendant from preparation of a cause and its attendant expense, in a considerable class of cases.

The order will be that the complaint be dismissed, unless the plaintiff, within ten days after service of a copy of this order, and a copy of the costs of the action as adjusted, pay the same to the defendant's attorney. In case of such payment, the plaintiff is permitted to bring the cause to trial at the next trial-term of this court.

As some doubt has existed upon the practice, no costs are allowed of the present motion.

MARKS *a.* WILSON.*New York Superior Court; Chambers, August, 1860.*

SUMMARY PROCEEDINGS.—INJUNCTION.—SUNDAY.

In general, an injunction should not be granted to restrain the execution of summary proceedings to recover possession of land, except in case of undue advantage, fraud, or surprise, to which the landlord is a party.

The fact that process was served on Sunday does not render the judgment therein void.

Motion for an injunction.

This was an action to restrain the defendant, a constable, from executing a warrant to dispossess the plaintiff obtained in summary proceedings to recover possession of certain premises. The facts are fully disclosed by the opinion.

Mr. Seixas, for the motion.

Mr. Chadsey, opposed.

HOFFMAN, J.—The complaint is for an injunction to restrain the defendant from executing a warrant granted by a justice of the Marine Court of the city of New York, to dispossess the plaintiff under the act "Of summary proceedings to recover possession of land," &c. (2 *Rev. Stat.*, 612, vol. 3, 5 ed., 836, § 8.) The warrant was for holding over, after the expiration of the term, without permission.

Section 47 of the act provides that the Supreme Court may award a certiorari for the purpose of examining any adjudication made on any application hereby authorized; but the proceedings on any such application shall not be stayed or suspended by such writ of certiorari, or any other writ or order of any court or officer.

The case of *Duigan a. Hogan* (1 *Borow.*, 645) settles the law in this court, holding that the Code (section 219) is not inconsistent with section 47 of the statute, and that it remains in

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force; and leaving, probably, no case whatever, except one of undue advantage, fraud, and surprise, to which the landlord is a party, in which an injunction can be granted. *Forrester v. Wilson* (1 *Duer*, 624) was of this character, and rests upon its own peculiar circumstances. See also *Hyatt v. Burr* (8 *How. Pr.*, 168).

But, again, I am clear that the injunction ought not to issue upon any ground as to which the party could have relief in a fixed statutory method, adequate to the purpose.

This method for redressing every error, defect, or irregularity apparent on the record, is prescribed by section 57, giving a certiorari. That writ has been sued out, and is now pending in the present case, although the stay of proceedings originally granted has been discharged. (*Marseilles v. Bulger*, 19 *How. Pr.*, 34.)

An appeal also lies to the Common Pleas from an adjudication in such a proceeding. (1 *Hilt.*, 399; 3 *Rev. Stat.*, 5 ed., 840, § 52.)

Of the defects and alleged errors in the proceedings, the certiorari will take up all the defects in the affidavit.

Sections 48 and 49 of the statute provide for restitution of the possession, if the proceedings are reversed, and for damages sustained by reason of such proceedings. It is said that the defendant is insolvent. This is denied; but if it were the fact, it could not form a ground for any injunction.

The next point, and one which could not arise upon a certiorari or appeal, is, that the service was made on Saturday, and that the plaintiff is of the Jewish persuasion and religion.

By the statute (5 ed., vol. 2, 936, §§ 69-71), persons keeping the seventh day holy are exempted from performing certain duties thereon; and any person who shall knowingly or maliciously cause any process, issued from a justice's court in a civil suit, to be served on said day on any person, or who shall serve process returnable on such day, shall be guilty of a misdemeanor, and be subject to a fine of \$100. And so for procuring a suit to be tried on that day.

This is the law of 1847, ch. 349, now in force. The statute of May 7, 1839, under which *Munson v. Amory* (1 *Den.*, 204) was decided, is repealed.

That authority is enough, under the existing statute, to show

that service on Saturday would not be sufficient to avoid the judgment. The service knowingly and maliciously is denied, and not in any way established.

The only remaining ground on which the plaintiff could ask for the interference of the court relates to the merits, viz., the denial of the relation existing which justifies proceedings under the statute. He contends that he took possession under the contract of sale of the premises, which is set forth.

The plaintiff was to consummate his purchase (dated the 28th day of March, 1860) by the 28th day of April. He was let into possession on the 2d day of April. The terms of the contract were that he was to pay for the property on the 28th day of April. The defendant was not bound to have let him in possession before. He did so, very clearly, with the expectation, and with implied condition, that he should then pay according to contract. His taking possession without any reservation, was a waiver of objections to the title. He avers that the only objection he has is the existence of two judgments against a former owner, which, it is alleged, are not liens; that the judgments were against a different person of the same name; at any rate, it is positively sworn that the property is clear, except from the two mortgages.

I am by no means prepared to say that Henry, the agent, was acting illegally, much less fraudulently, in the affidavit he made to obtain the warrant in the Marine Court.

But independently of this, there was a plain method for the plaintiff to have obtained redress.

I take it for granted that the Marine Court could have opened the default on proper application. (*Mitchell v. Menkle*, 1 *Hilt.*, 152; *Laws of 1853*, ch. 617, § 5.)

But again, section 366 of the Code affords a most complete remedy upon an appeal to the Common Pleas, in case of a failure to appear, and by affidavits showing that injustice would be done, and satisfactorily excusing the default. (*Foster v. Capewell*, 1 *Hilt.*, 47; *Lent v. Jones*, 4 *E. D. Smith*, 52; *Mulhern v. Hyde*, 3 *Id.*, 177.)

I consider that for every alleged irregularity or defect, as well as for a full investigation of the merits and justice of the case, the law has explicitly provided summary and adequate modes of redress, without recourse to an injunction; and that,

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if there can be presented a case in which the interference by injunction may be allowed, the present is not one of them.

Motion for injunction denied. The temporary order discharged, with \$10 costs.

DIVINE'S CASE.

*Before Hon. Josiah Sutherland, Supreme Court, First District ;
August, 1860.*

SPECIAL SESSIONS.—HABEAS CORPUS.

Upon habeas corpus the prisoner may impeach the commitment by showing that the court which made it was not legally constituted ; *e. g.*, that one of the justices named as present, was in fact absent.

Two justices cannot legally hold a Court of Special Sessions in the city of New York. Three are necessary.

Habeas corpus to inquire into the detention of James Divine.

The prisoner was committed on conviction of petit larceny, at a Court of Special Sessions in the city of New York. The facts are fully stated in the opinion.

Theodore Stuyvesant and *Mr. Phillips*, for the prisoner.—

I. The court could not be held by less than three justices. (3 *Rev. Stat.*, 5 ed., 370, §§ 13, 14 ; same statute, *Laws of 1858*, 441, ch. 285, §§ 8, 9 ; 3 *Rev. Stat.*, 5 ed., 869.)

II. The want of jurisdiction may be shown here. (Note to *People v. McLeod*, 3 *Hill*, 665 ; *Randolph's Case*, 11 *Am. Jur.*, 33 ; *Exp. Beatly*, 12 *Wend.*, 229 ; *Riley's Case*, 2 *Peck* ; *People v. McLeod*, 25 *Wend.*, 483 ; *Yates v. People*, 6 *Johns.*, 337 ; *Exp. Kellogg*, 6 *Vt.*, 511 ; *Cow. & H. notes*, part 2, 800.)

Mr. Sedgwick, assistant district-attorney, opposed.

SUTHERLAND, J.—The warden, or keeper of the penitentiary, to the writ of habeas corpus, returns a copy of the commitment

under which the prisoner was received into his custody, and by virtue of which he is held and detained. The commitment is in due form, and regular on its face. By it, it would appear, that the prisoner was duly convicted of the crime of petit larceny, at a Court of Special Sessions of the Peace, held by three police-justices—Quackenbush, Kelly, and Steers—on the 31st day of July, 1860, and that upon such conviction he was ordered and adjudged to be imprisoned in the penitentiary for the term of three months.

It was alleged on behalf of the prisoner, by way of a traverse of this return, that the said Court of Special Sessions at which the prisoner was tried and convicted, was in fact held by two of the police-justices only, viz., Justices Quackenbush and Steers; that Justice Kelly was not, in fact, present when the prisoner was arraigned, tried, or sentenced; and proofs were offered, *aliunde* the commitment or return, to prove such allegations.

These proofs were objected to by the assistant district-attorney on the ground that in this habeas-corpus proceeding, I could not go behind the commitment; that it was of the nature of final process, and could not be impeached in this proceeding. He also insisted that two police-justices were authorized to hold a Court of Special Sessions, and therefore, that the allegations and the proofs thereof were immaterial.

The proofs were received and the questions reserved.

No objections were made by the assistant district-attorney to the form of the proofs.

It is conclusively shown, by several affidavits of parties present at the trial, and by the certificate of the clerk of the said Court of Special Sessions, that the said court at which it is alleged the prisoner was so tried and convicted, was in fact held by only two justices; that Justice Kelly was not present when the prisoner was arraigned, plead, tried, or sentenced.

The questions, then, are—

1. Has the prisoner a right in this proceeding thus to impeach the commitment?

2. If he has this right, do the facts shown by the affidavits and the certificate of the clerk of the Court of Special Sessions, so far impeach the commitment and the jurisdiction of the court

which tried and sentenced the prisoner, as to entitle him to his discharge?

I think that both questions must be answered in the prisoner's favor.

If two justices could not legally hold a Court of Special Sessions, but it took three to constitute such court, then the trial, conviction, and commitment of the prisoner was absolutely void; for then the alleged court that tried and sentenced him was not a court, and the two justices who tried and sentenced him had no jurisdiction whatever, and the prisoner was and is unlawfully imprisoned.

Now, it is the very office of the writ of habeas corpus to ascertain whether the prisoner is unlawfully imprisoned; and how could the prisoner in this case show that the court was illegally constituted and had no jurisdiction, except in the way he has done by proof *aliunde* the return or commitment?

The prisoner could hardly estop himself from the right of showing at any time, and at all times, a total want of jurisdiction.

It is plain by authority, as well as on principles, that the prisoner has a right to show in this proceeding, that the court, or magistrate acting as a court, who tried and sentenced him, had no jurisdiction. It is sufficient to cite *The People v. McLeod* (3 *Hill*, 669, and notes).

If, then, the two justices, who undertook alone and without a third, as a Court of Special Sessions, to try, and sentence, and commit the prisoner, could not, and did not legally constitute a Court of Special Sessions, and had no power to try, convict, or commit him, he must be discharged.

Whether the two justices did or could constitute such court and had such power, depends upon the construction of sections 8 and 9 of the act of April 16, 1858, entitled "An act to provide for the appointment of a clerk and deputy of the Court of Special Sessions, in the city and county of New York, and in relation to the justices of said court." (*Laws of 1858*, 441, ch. 282.)

By section 8, "The said Court of Special Sessions may be held by any three of the said police-justices, who shall sit alternately, except that one of their number may be selected to preside. And the said justices shall meet in convention and

assign justices to hold the several terms of said court. By section 9, all acts and parts of acts inconsistent therewith, are repealed.

By section 48 of act of April 14, 1857, amending the city charter (1 *Laws of* 1857, 890), Courts of Special Sessions in the city of New York, *may* be held by any *two* police-justices of said city, and it is thereby declared that when so held, all the powers and jurisdiction appertaining by law to such court, shall be possessed and exercised by the officers holding the same.

The question is, was the provision in the act of 1857, repealed by the act of 1858?

It is almost too plain for argument that the word *may* in both statutes means shall. It is hardly necessary to resort to the general provision of the Revised Statutes, vol. 3, 5 ed., 869, § 29, to show this. Statutes conferring criminal jurisdiction should be construed strictly. Not less than three justices can hold the court, under the act of 1858. It would certainly be extraordinary if we had two statutes on our Statute Books in force, the one authorizing Courts of Special Sessions in the city of New York to be held by two, and the other by three police-justices.

I think the provision in the act of 1857 plainly inconsistent with the act of 1858, and was intended to be, and was repealed by it; and, therefore, the prisoner must be discharged.

WASHBURN *a.* FRANKLIN.

Supreme Court, First District; Circuit, December, 1859.

CONTRACTS.—REPEAL OF STATUTE.

A contract prohibited by statute, and entered into while the prohibiting statute is in force, is not rendered valid by a subsequent repeal of the statute.

Trial by the court.

The action was brought to recover damages for not fulfilling a contract for the purchase from plaintiff of certain stock.

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The time of the making of the alleged agreement was prior to the act of 1858 (*Laws of 1858*, 251, ch. 134), repealing the statute prohibiting stock-jobbing. (1 *Rev. Stat.*, 710.)

The plaintiff was not the owner of the stock at the time of making the agreement, nor was he in possession of it. See a decision on a demurrer to the complaint, reported 7 *Ante*, 8.

STRONG, J.—The contract which is the basis of this action, at the time it was made, was void by the express terms of section 1 of the stock-jobbing act. That section has since been repealed, but I am unable to perceive how the simple repeal can make the contract valid. By declaring the contract void, the statute had done its work in respect to the contract; in a legal view there was no contract when the statute was repealed; and I do not see how its repeal merely, can give what was void vitality.

The case of *The Central Bank v. The Empire Stone-Dressing Co.* (26 *Barb.*, 23), is referred to as authority that the repeal of the statute abrogated its operation as to prior contracts; but there is this distinction between the two cases: in the latter case, the contract was claimed to be void because it was contrary to the statute prohibiting the circulation within the State of foreign bank-notes of a denomination less than five dollars; it was not declared void by the statute. The contract being illegal it could not be enforced while the statute existed, but it was held it might be after the statute was repealed. The court, in their opinion, do not place the decision upon the ground that the contract was not declared void by the statute, but I think it can be sustained if at all only on that ground.

On account of the distinction mentioned, I think I am not controlled by the case cited; and following my own convictions as to the law, must order judgment in favor of the defendant.

Judgment accordingly.

SEEBACK *a.* McDONALD.*Supreme Court, First District ; Special Term, July, 1860.*

SUMMARY PROCEEDINGS.—INJUNCTION.

The court will not interpose by injunction to prevent a party from prosecuting summary proceedings to recover possession of land, where the complainant had a perfect defence to their proceedings before the justice, and does not show that he had not evidence to prove such defence, and no fraud or abuse is shown.*

Motion for an injunction.

BONNEY, J.—The complaint in this action, sworn on 5th May, 1860, states that on 8th February, 1860, Edward Cahill, the owner of the house and lot, No. 109 West Forty-second-street, New York, demised the same to the plaintiff, for one year from 1st May, 1860 ; that the plaintiff then was, and ever since has been, in possession of said premises ; that on 1st March, 1860, Cahill demised the same premises for the term of three years from 1st May, 1860, to the defendant, who then knew of said prior demise to the plaintiff ; that on 4th May, 1860, defendant commenced summary proceedings before the justice of the fifth district for possession of said premises ; that since said demise to him the plaintiff has expended \$300 in repairs on the premises ; that the defendant has no right to said premises, or to maintain his proceedings, but plaintiff has the right to such possession ; and plaintiff prays that defendant be enjoined from prosecuting said summary proceedings, and from interfering with plaintiff's possession of the premises.

On this complaint an order was obtained, requiring defendant to show cause why he should not be enjoined from proceeding to obtain possession of the premises ; and, until the hearing and decision of the motion restraining such proceedings.

The defendant (on showing cause), by answer, denies that

* To the same effect is *Marks a. Wilson*, *Ante*, 87.

Seeback *a.* McDonald.

Cahill demised the premises in question to the plaintiff for the year from 1st May, 1860, and that plaintiff was not, on 8th February, 1860, or at any time since has been, or is, in occupancy of the premises as tenant of Cahill, and generally denies all plaintiff's alleged rights. Defendant further states, as a separate defence, that, pursuant to the provisions of the Revised Statutes, he, on the 4th of May, commenced summary proceedings against the plaintiff and others to recover possession of the premises in question; that the plaintiff appeared and filed an affidavit with said justice, and the matters thus controverted were tried by a jury, who rendered a verdict in favor of this defendant (McDonald), and thereupon, on said 4th May, and before the commencement of this action, the said justice issued his warrant to dispossess this plaintiff. Copies of proceedings before the justice are annexed to said answer, from which it appears that this plaintiff set up, by way of defence, before said justice, the alleged demise of said premises to him by Cahill on 8th February, 1860. The plaintiff has read on this motion two affidavits, tending to prove his allegation, that the premises were demised to him by Cahill, and the defendant has also read affidavits in opposition, the contents of which it is not necessary to state, as they tend to sustain the answer.

Upon the complaint alone, this motion should, in my opinion, be denied. If the statements in the complaint are true, the plaintiff had a perfect defence to the proceedings before the justice, and he does not allege that he had not evidence to prove all the facts by him stated. The answer denies, in effect, all the alleged rights and equities of the plaintiff, and is in part sustained by affidavits. It also shows that the question now sought to be litigated, was raised and tried in the summary proceedings, and decided against the plaintiff, and that a warrant to dispossess the plaintiff was issued before this action was commenced; which facts the plaintiff wished to state in his complaint, without reference to the statute prohibiting the staying of summary proceedings by order (3 *Rev. Stat.*, 5 ed., 839, § 47), and I cannot see that any case is here made which authorizes the interposition of this court.

It was argued by counsel upon numerous authorities cited, that this court might interfere to prevent or redress fraud in summary proceedings under the statute, or an abuse of such

proceedings; but the principle, if sustained, is not applicable to this case, for the reason that neither the complaint nor plaintiff's affidavit show any such fraud or abuse.

The motion for an injunction is denied, and the other, to show cause, is vacated, with ten dollars costs to defendant.

PEOPLE *v.* AMBRECHT.

Supreme Court, Fifth District; At Chambers, before Hon. W. F. Allen, July, 1859.

EJECTMENT.—PARTIES.

An action to recover the possession of lands must be brought against the tenant in possession, since as well as before the Revised Statutes.

A soldier of the United States, claiming to be in charge, under superior officers, of real property, as property of the United States, is not the actual occupant, and an action cannot be maintained against him.

Action of ejectment.

This action was brought to recover possession of part of the Old Fort Military and Parade Ground, in Oswego.

The premises in question, comprise part of the grounds which the United States government had claimed and occupied since 1839, as a military station, and within which grounds (but not comprising a part of the "*locus in quo*") is "Fort Ontario."

The defendant was an enlisted soldier of the United States, stationed at Fort Ontario, to take charge of personal property of the United States there stored, and had occupied a building in the fort for eight or ten days before the suit was commenced.

On the 25th of April, 1839, the Legislature of the State of New York, passed an act authorizing the commissioners of the land-office to convey to the United States the title of the State, to "*all* that part parcel of land lying near the mouth of the Oswego River, in Oswego county, known as the 'Old Fort

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Military and Parade Ground.'” The act ceded jurisdiction to the United States over the land to be conveyed—such jurisdiction not to be construed to prevent or impede the execution of any process, civil or criminal, under the authority of the State, except so far as such process may affect the real or personal property of the United States within the said parcel of land.

A survey of the grounds was made by John McNair, city surveyor of Oswego, in July, 1839, and on the 15th of August, 1839, a patent was issued by the State to the United States, conveying the premises by the description of the “Old Fort Military and Parade Grounds,” and by the boundaries given in McNair’s survey.

On the 25th of June, 1851, the Legislature passed an act authorizing the commissioners of the land-office to grant to the city of Oswego the *land under water lying in front* of the land granted to the United States in the city of Oswego, between the east pier and the Cove property.

On the 20th of May, 1852, a patent was granted pursuant to that act, *the description of the inner line being copied from the patent to the United States*.

This action was brought by the State of New York in behalf of Gerret Smith, who claims under the patent to the city of Oswego.

The cause was referred, by order of the court at circuit, to Hon. W. F. Allen, and it was accordingly tried before him at chambers.

L. Tremain, attorney-general, for the plaintiffs.

J. C. Spencer, attorney for defendant.

W. F. ALLEN, J. (referee).—The action is brought to test the right of Mr. Gerret Smith, under a lease from the city of Oswego, to a narrow strip of land in the harbor of Oswego in front of “Fort Ontario,” and which has been inclosed and claimed by the United States under a grant from the State, for the purpose of a military post and fortification. The grant to the United States was made in 1839, pursuant to an act of the Legislature, passed April 25th, of that year, to be used “for the purpose of re-establishing the military post, of rebuilding

the fort, redoubts, and barracks, and of improving the parade ground." The general government, by its officers and agents, took possession and erected a fort upon the premises claimed under the grant, and have occupied them as a military post up to the present time. For the purpose of protecting them against the action and encroachment of the water upon the river side, a sea-wall was built by the United States in front of the "fort property," but whether within the limits of the grant is one of the questions controverted: the claim being, on the one hand, that the wall is upon, or at least not beyond, the westerly bounds of the grant; and on the other, that it embraces within the fort grounds land not embraced in the grant, and included within the subsequent grant to the city of Oswego. In 1852, under a law of 1851, authorizing the commissioners of the land-office to grant to the city of Oswego "the land under water in front of land granted to the United States," a grant of land was made to the city of Oswego conterminous on the easterly side with the lands granted to the general government, which lands were soon thereafter leased by the city of Oswego, and the lease has come by assignment to Gerret Smith. The litigation grows out of a disputed boundary between those two grants. The defendant is an ordnance-sergeant of the army of the United States, appointed under the act of Congress of April 5, 1832 (4 *Stat. at Large*, 504), "to receive and preserve the ordnance, arms, and ammunition, and other military stores at the post." In the absence of troops and a commanding officer, he had charge of the whole post as ordnance-sergeant, and under the directions of the adjutant-general, Hammond, at "Fort Ontario," about the 1st of September, 1858, took charge, superseding his predecessor a few days after; and on the 14th of September this action was commenced. He resides in quarters set aside for that purpose upon the fort grounds, and other families by permission from the proper source reside in the "officers' quarters," or dwelling-houses within the fort. The defendant, as well as the other residents within the "grounds," depasture their cows upon the premises, and the defendant testified that he cut the hay in case he wanted any, but had not at the time of the trial cut it. There is no proof that he was ever upon the disputed territory, or ever interfered in any way with the land claimed in this action, or obstructed or hindered

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those claiming under the grant to the city of Oswego, from occupying or taking possession of all that they claimed. It is objected that the defendant was not at the time of the commencement of the action the "actual occupant" of the premises, and was not, therefore, properly subject to an action of ejectment, for it is only as an "occupant" that the action will lie against him. (2 *Rev. Stat.*, 304, § 4.) The general rule is that in an action of tort all persons concerned in the wrong are liable to be charged as principals. (*Cranch v. White*, 1 *Bing. N. C.*, 414.) It was said, in *Sands v. Clurd* (3 *Lev.*, 352), that "the warrant of no man, not even of the king himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the act." (*Guille v. Swan*, 19 *Johns.*, 381.) The command of a superior to do an act which amounts to a trespass, is no justification to the inferior. (*Brown v. Howard*, 14 *Ib.*, 119.) The dictum seems to be modified in cases where the act of trespass is afterwards adopted and ratified by the crown. (*Burow v. Denman*, 2 *Exch.*, 167.)

But while ejectment is an action *ex-delicto*,—the act complained of being technically a trespass *quare clausum fregit*, sounding in damages only,—and is a possessory action, and in this State has taken the place of a real action, to try the "mere right" to real property, it is in substance an action to recover the possession of the premises, and must be brought against the "wrongful occupant" of the land. (*Goodryght v. Gorett*, 7 *T. R.*, 327; *Brown on Parties*, 246.) Under the former practice, before judgment could be taken against the casual ejector, the declaration must have been served upon the "tenant in possession," and service upon a person upon the premises in any other capacity would not have sufficed. He was the real party to the action, the one to be dispossessed by a judgment in favor of the lessee of the plaintiff. Hence, upon a recovery in an action defended by the landlord, the recovery could only be had for the quantity of land in the possession of the party served as the tenant in possession at the commencement of the action. (*Ferm v. Wood*, 1 *B. & P.*, 573; *Doe v. Roe*, 1 *Ch. R.*, 574.) The revisers in recommending, and the Legislature in adopting the provisions of the Revised Statutes, by which the proceedings in this action were greatly simplified,

and the real parties made to take the place of fictitious parties upon the record, did not intend to change the substance of the action. The revisers in their note say "they have carefully adhered to the leading principles of the action, so as to make little or no alteration except in the form of the proceedings." (3 *Rev. Stat.*, 3 ed., 707.) By "actual occupant," in designating the individual against whom the action might be brought, was intended no more than the "tenant in possession," as that term was used in the former practice. Occupant is he that has possession, one who has the actual use or possession of a thing. (*Webster's Dic.*; *Burrill's Law Dic.*, *h. t.*) A tenant in possession is simply one who holds the land in possession or occupancy. Was, then, this defendant, this soldier, the "actual occupant," the "tenant in possession" of the lands granted by this State to the United States, and known as the "Fort Grounds?" for if so, he may be very properly treated as in possession of all the lands within the inclosure, and claimed and occupied by the United States for their special purposes, including the strip in dispute, although he may never have set his foot upon it, or exercised any control over it, and the action may be maintained against him, in case the plaintiffs establish their title. A person may occupy land, as he may do any other act, either in person or by an agent or servant, and in the latter case, the possession and occupation of the agent or servant will be that of the principal, and it cannot be at the same time the occupation of the servant.

A corporation aggregate, which can only act by its agents, can acquire a title by disseizin, and, as occupants or tenants in possession, be liable to an action of trespass and ejectment. (*Doe v. Roe*, 1 *A. & E. N. S.*, 700; *Doane v. Broad-street Association*, 6 *Mass.*, 332; *Dexler v. Troy T. & R. R. Co.*, 2 *Hill*, 629; *Bloodgood v. M. & H. R. R. Co.*, 18 *Wend.*, 9.) A tenant in possession may reside abroad and carry on his business by an agent residing on the premises, and the tenant, not the agent, will be the proper party-defendant in an action of ejectment. (*Doe v. Roe*, 4 *B. & Ald.*, 653.) The presumption is, that he who resides upon premises is the occupant or tenant in possession; but it is a mere presumption which must yield to evidence, and the question of possession is one of fact, to be determined upon all the evidence in the case. In an ac

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tion of ejectment, brought against the defendants as trustees of a church, it was held to be a proper question for the jury whether the defendants were actually in possession, or only as trustees; in other words, to determine whether the defendants were in possession, or the corporation through them as its officers. (*Lucas a. Johnson*, 8 *Barb.*, 244.) *Doe a. Staunton* (1 *Chit.*, 118; same case somewhat differently reported, 2 *B. & Ald.*, 371) decides that a mere servant of the lawful occupier of an estate cannot be made a defendant in ejectment; but that when a servant in the visible occupation of premises, assumes the character of the tenant in possession, he is liable to be made defendant, and his conduct is evidence to go to the jury to presume that he is the tenant in possession, unless that fact is rebutted by other evidence. In that case the defendant, by his conduct and language, at the time of the service of the declaration, and subsequently, resisted the plaintiff. He did not explain the character of his occupation when he might have done so. BAYLEY, J., says: "If he had explained the true character of his occupation, he never could be liable to an action for mesne profits, unless his occupation was in the character of a tenant." *Shaw a. McGrain* (12 *Wend.*, 558), although not decisive, is somewhat to the point. It was there said, although it was not necessary to the decision, that when premises for which an action of ejectment is brought, are actually occupied and possessed, though by a mere servant, who claims no beneficial interest in them, and labors wholly for his employer, the action must be brought against such servant, and not against his principal. It was decided that when a party not in the actual occupation of premises, as distinguished from the exercise of acts of ownership, is found in the cultivation of, and working upon such premises, and an action of ejectment be brought against him, it is competent for him to show that he labors upon the premises as the mere servant of another; and if the jury find his allegation to be true, and that he is not the tenant of the premises, he is entitled to a verdict in his favor. Under what circumstances the learned judge would have deemed the mere servant the occupant and tenant in possession, and subjected him to the action of ejectment, and charged him with the mesne profits in exoneration of the principal and employer for whom he labored, does not appear. It cannot, I

think, be claimed under the intimation of Judge Sutherland, that a servant who occupies a dwelling or a farm, which is furnished as a part of the compensation for his services, and tilling the farm under the direction of an employer for monthly wages, exercising no control over the farm or its products, except in obedience to the commands of his employer, is an actual occupant of the farm in any sense of the term. Mesne profits may be recovered of the defendant, upon the recovery of a judgment by the plaintiff in an action of ejectment. (2 *Rev. Stat.*, 310, § 63, and seq.) And it is nowhere intimated that a party liable to the latter action, can be excused from liability for mesne profits by reason of the character of his occupation. It is not reasonable that there should be any distinction, and none is made by statute. In this case, there is no dispute as to the facts. The defendant never has had, or claimed to have, any interest in the occupancy or possession of the premises, or to have had any possession of them in any manner. The most that he had claimed is to be in charge, under his superior officers, of the property of the United States. He is a soldier in the army of the United States, having certain specific duties assigned him in and about Fort Ontario, and has quarters assigned him by the proper authorities for his residence within the fort grounds, but entirely away from the disputed strip of land. The premises, so far as they were occupied at all, were occupied by the United States.

The individuals in temporary command or charge, whether officers or soldiers, are mere servants, acting in obedience to the lawful commands of their superior officers, and all under authority of law and the general government. They are liable to be removed from the post or superseded in command at any moment, and are not occupants or tenants in possession of a single foot of the land which they may use, or be upon, in the discharge of their duties. For any wrongful act to the injury of the property of others, they are individually liable; and their character as soldiers, and the fact that they acted in obedience to the commands of their superiors, will not shield them.

Perhaps for a peaceable entry and detainer of the land of an individual, proceedings might be had under the act giving redress in such cases. (2 *Rev. Stat.*, 507.)

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It is not necessary to consider that question. It is enough that the defendant in this action is not the occupant of the premises in dispute, and the action will not lie against him. If this objection were obviated, another difficulty would have to be met, that is if it be conceded, that upon a visible occupation in all respects like that of the defendant, except that he was acting for, and representing an individual instead of the government, an action of ejectment would lie against, and the possession of the premises recovered from him, and through him his principal might be ousted, it does not follow that the possession of the government can thus be lost. "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction in it." (Per Chief-justice Marshall; *United States a. Clark*, 8 *Peters*, 463; and in *Cohen a. Virginia*, 6 *Wheat.*, 264.) Ejectment could not therefore be brought against the United States any more than an action of assumpsit, and it seems to follow that they cannot be indirectly sued in the person of their agents and officers, and the title and claim thus subjected by indirection to the jurisdiction of the State courts. In theory it is unreasonable, and in practice it might prove mischievous, by bringing the State and national sovereignty in conflict. The State by its militia would be bound to execute the power of its courts, and give possession in pursuance of a judgment in ejectment, while the United States might be disposed to retain possession of its fortifications and barracks by a resort to force if necessary.

Suppose that by the time judgment and a writ of possession should be awarded to the plaintiff, the defendant should be court-martialed or superseded, and a body of United States troops should occupy the fort, of what avail would the power of the State court, and the posse of the county, be to the plaintiff in obtaining possession of the premises? Certainly the judgment in an action against a soldier would not bind the United States, or estop them from claiming title in hostility to it.

But without pursuing the subject further, I am of the opinion that the defendant is entitled to judgment, on the ground that he was not, at the commencement of the action, the occupant of the premises.

Order entered accordingly.

MOSELY a. MOSELY.

Supreme Court, Sixth District; Special Term, September, 1860.

ACTION OF EJECTMENT.—DEATH OF DEFENDANT.—ABATEMENT.

In an action under the Code, to recover the possession of land, corresponding to the former action of ejectment, the death of a sole defendant before verdict abates the action; and the court has no power to authorize the continuance of the action, by supplemental complaint or otherwise, against his heirs at law. *It seems*, that in respect to this question, the action of ejectment stands on the same ground as that of replevin.

Petition for leave to file a supplemental complaint to continue the action against the heirs at law of the defendant.

This was an action in the nature of ejectment, commenced in 1848. A verdict and judgment was rendered in favor of the defendant, which was affirmed at general term. The Court of Appeals granted a new trial; but while the appeal was pending in that court, the defendant died, leaving children.

Samuel Love, for the motion,

Benj. G. Ferris, opposed.

PARKER, J.—This is an application by the plaintiff to continue the action by supplemental complaint against the heirs of Aaron Mosely, the original defendant, who died more than a year prior to the application.

The action is set forth in the petition, on which alone the application is founded, the complaint not being before the court. It was brought by the plaintiff in 1848, "to recover in his own right in fee the possession" of fifty acres of land therein described; and is what would have been, under the old nomenclature, an action of ejectment.

The Code (§ 121) provides that "no action shall abate by the death, marriage, or other disability of a party, or by the

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transfer of any interest therein, *if the cause of action survive or continue*. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action. After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party; but the case shall proceed thereafter, in the same manner as in cases where the cause of action now survives by law."

Whether this application can be granted, depends on the question whether the *cause of action survives or continues*. For although a trial has been had, and a verdict against the plaintiff, that has been set aside, and a new trial granted upon appeal; and the case stands in respect to this application, as though no verdict had been rendered.

Does the cause of action, on which this action was brought, survive or continue against the heirs of the original defendant, Aaron Mosely? This question would seem to be answered by the latter clause of the section above cited, in the negative. The action is for a "*wrong*" within the meaning of that clause; not resting in fact or theory, upon any breach of contract, but upon a wrongful withholding by the defendant of the possession to which the plaintiff was entitled; and if for a wrong, as that clause asserts by implication, the cause of action does not survive.

But however that may be, it certainly does not survive or continue against the heirs of the deceased defendant, unless by virtue of some statute. At common law the cause of action did not survive, and the action abated.

We have a statute authorizing an action by any person, against the "executor or administrator of any testator or intestate, who, in his lifetime, shall have wasted, destroyed, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of any such person." (3 *Rev. Stat.*, 202, § 5, 5 ed.) In such case the cause of action is made, by the statute, to survive, and the action may, therefore, be continued against the ex-

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ecutor or administrator. But there is no statute continuing a cause of action, like the one on which this action was brought; and if not, the action cannot be continued against the successors in interest of the deceased defendant.

This construction of section 121 of the Code is in accordance with the opinion of Justice Willard, in *Putnam v. Van Buren* (7 *How. Pr.*, 31);* although that case may have been decided upon another ground. In the case of *Waldorph v. Bortle* (4 *Ib.*, 358), Justice A. J. Parker came to a different conclusion; but he puts his decision on section 118, which provides that "any person may be made a defendant who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein."

That section, as it seems to me, has no bearing on the question whether the action had abated by the death of the sole defendant; nor whether the action already commenced, could be continued against his heirs; but describes who are proper parties-defendants to an action when commenced, or while proceeding. Unless the cause of action for which this action was originally commenced, survived or continued against such parties by virtue of some statute, as above stated, the action abated, and could not be continued.

It is not enough that the parties against whom it is sought to continue the action, have succeeded to the legal rights of the original defendant, for that does not make them liable for the wrongful act of such defendant, no statute casting on them such liability.

In respect to this question, the action of ejectment stands on the same ground as the action of replevin. In *Webber's Ex. v. Underhill* (19 *Wend.*, 447), it was held, upon an elaborate discussion of the question upon principle and authority, that the action of replevin abated by the death of a sole defendant, and could not be continued against his executors, even upon their own application. And in *Hopkins v. Adams* (5 *Abbotts' Pr.*, 351), under the Code, it was decided by the Superior Court of the city of New York, that an action for the recovery of the

* To similar effect, also, is *Mosely v. Albany Northern Railroad Co.* (14 *How. Pr.*, 71).

Anonymoua

possession of specific personal property against a sole defendant, wholly abates, if the defendant dies before verdict or judgment; and the court has no power, in such case, to order the action to be continued against the personal representatives of the defendant.

To that conclusion I have come in this case. The court has no power to order the action to be continued, by supplemental complaint, or otherwise, against the heirs of the deceased defendant.

The motion of the plaintiff is therefore denied, with ten dollars costs, to the heirs, of opposing the motion.

ANONYMOUS.

Supreme Court, First District; At Chambers, September, 1860.

SUPPLEMENTARY PROCEEDINGS.

In what case a third party examined in supplementary proceedings is entitled to costs.

Motion for costs under section 301 of the Code.

Benedict & Boardman, for the motion.

BONNEY, J.—The plaintiffs in February, 1856, recovered judgment against the defendants for two thousand dollars and upwards, and issued execution, which was returned unsatisfied. They also instituted supplementary proceedings against the defendants. In March, 1859, the plaintiffs, upon affidavit that a third person named had property of the judgment-debtors of greater value than \$10, obtained an order for the examination of such third person under section 294 of the Code. The examination was referred, and proceeded before the referee on two days, and was adjourned to 20th July, 1859, when said third party made default by not attending. On 24th January,

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1860, the referee reported such default, with the examination taken before him, to the court, and such examination afterwards proceeded at chambers in presence of the court on three different days, ending on 23d March. Two adjournments were afterwards had, but nothing was done on the adjourned days. The examination was long, minute, and searching. Several questions were objected to as not pertinent to the inquiry, or permissible in this proceeding, and some of them the party under examination refused to answer, and at times there appears to have been some excitement of feeling between the party under examination, and the plaintiffs or their counsel. No property of defendants has been discovered by this proceeding, and the party examined now moves for costs under section 301 of the Code, and in my opinion he is entitled to the full amount (\$30) in that section mentioned.

When an execution has been returned unsatisfied, the plaintiff therein, may, under section 292 of the Code, institute supplementary proceedings against the defendant, and on such proceedings may, under section 295, call and examine as witnesses all persons who are supposed to be indebted to the defendant, or to have, or have knowledge of, any property belonging to him. Persons so called, and examined as witnesses, are entitled only to witness-fees for attendance; and if found to have money or other property belonging to the defendant, or to be indebted to him, may then be compelled to pay or apply the same in satisfaction of plaintiff's judgment.

The plaintiff may, also, at his election, prosecute supplementary proceedings against any third person in relation to whom he can make or obtain an affidavit that he has property of the judgment-debtor, or is indebted to him in an amount exceeding ten dollars. The proceedings are summary, but in the nature of an equitable action to obtain money or property to which plaintiff claims the right in equity to have applied to his use; and if he fails in the proceeding, I can see no reason why plaintiff should not pay to the respondent costs in like manner, as if he had prosecuted an action against the respondent, and failed therein. In the view I take of these sections of the Code, supplementary proceedings against a third party are seldom necessary when the judgment-debtor is within the jurisdiction of the court, and should only be commenced when the plain-

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tiff knows, or has information from the party himself, or others on which he can rely, that such party has property which, under the Code, plaintiff is entitled to have applied on his judgment; and even in such case, and when property is discovered, in my opinion a party respondent who has been guilty of no fraud or concealment, but has been always willing to pay or apply the money or property in his hands as should be just and equitable, and has only sought to protect himself against a double claim therefor, should be allowed reasonable costs out of the funds in his hands. The same rule as to costs should apply as in cases of interpleader.

But when a respondent has, from the beginning, denied having any property of the judgment-debtor in his hands or under his control, and after several days' attendance, and a long and searching examination, it is decided that his denial was true, he is surely equitably entitled to reasonable costs, so far as allowed by law.

In this case, thirty dollars costs are allowed to the respondent.

SAWYER a. CHAMBERS.

Supreme Court, First District; At Chambers, September, 1860.

PARTIES.

The court will not order new parties-defendant to be brought in against the will of the plaintiff, unless their presence is necessary to the determination of the action.

Motion to make third persons defendants in the cause.

INGRAHAM, J.—The action in this case is against the indorsers of a promissory note.

It seems to be conceded that they are mere accommodation indorsers, and they move for an order to make the drawers of

the note, or the representative of the drawers a party-defendant, or to stay the plaintiffs' proceedings until the final determination of the action pending on behalf of such drawers against the plaintiffs.

From an examination of the complaint in that action, it is very apparent that it contains no cause of action against the plaintiffs here. It professes to be brought by the assignee of the company against Sawyer and others; avers the assignment to have been executed in December, 1848, by the corporation, and that the action is founded on a contract made with the assignee in July, 1858. It sets up no contract with the corporation, and no facts out of which a claim could arise in behalf of the plaintiff in that action, either in his own right, or by virtue of the assignment.

To stay the proceedings in this action until the other was decided, would be a mere delay on the part of the creditors here, for no apparent good, and without any probable result in that action to alter the rights of the parties. In the answer of the defendants in this action, however, the facts are differently stated, and if proved, could undoubtedly show a cause of action in behalf of the company against the present plaintiffs, which would more than cover any claims they have upon the note on which they sue, so far as relates to the company.

The only question therefore is, whether the court can order a plaintiff to sue a person against his will, where it is not necessary for the decision of the action which he has brought against a third person.

The more usual course would be the commencement of an action by the sureties against all the parties setting up the facts in these papers, and to ask the aid of the court in equity for this protection.

I doubt, however, the power of the court by an order such as is asked for in this case, to convert an action at law for the recovery of a debt into an action in equity, to be tried in a different manner, and involving very different issues.

If such an order could be made as the defendants ask for, to bring in as defendant the drawer of the note, I am at a loss to see how it could avail them. The plaintiffs would still be entitled to recover against the indorsers on the note distinct from the maker, and I know of no case where a counter-claim, set up

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by one party to a note against the holder, can be made available for the defence of another.

The statute as to suing all the parties to a note in one action, has not been repealed, and that statute permits a severance of the action at any time to take judgment against any of the parties. This right cannot be taken away by a mere order of the court as to adding parties.

It seems to me that the defendants have no remedy by which they can make the defence to the note in suit which they desire, except by the mode suggested before, viz., the bringing an action against all the parties, and seeking relief for the sureties in equity. Whether the facts disclosed in the defendants' answer are sufficient for that purpose, it is not necessary for me now to decide.

This motion must be denied; ten dollars costs to abide event.

EISEMAN a. SWAN.

New York Superior Court; Special Term, September, 1860.

UNDERTAKING.—INSOLVENCY OF SURETY.

The court will not require a party who has given security with two sureties, as the condition of a favor shown by the court, to renew the security merely because one surety has become insolvent.

Motion to compel defendant to add another surety to his bond, given on opening an inquest

BOSWORTH, J.—Where an inquest which has been taken against a defendant has been set aside by the court, and the defendant allowed to try the cause on giving a bond with two sufficient sureties, conditioned to pay any judgment that may be recovered in the action, and such bond is given with two sureties who justify, the defendant will not be required to file another bond with one good surety, merely because one of the

sureties in the bond actually given has become insolvent. (15 *How. Pr.*, 130 ; 4 *Abbotts' Pr.*, 460.)

In this case there has been a trial since the inquest was opened. The plaintiff recovered, and the court at general term has granted a new trial. The moving affidavits do not intimate that one of the sureties is not now abundantly sufficient, and the opposing affidavits represent him as abundantly good, and the defendant to be personally able to pay any judgment that may be recovered.

The motion to compel the defendant to give a new bond with one good surety is, therefore, denied.

WEBBER *v.* MORITZ.

New York Superior Court; Special Term, September, 1860.

ARREST.—MOTION TO VACATE.

An order of arrest should not be vacated merely on the ground that one of the plaintiffs is not a proper party.

This was an action brought by a husband and wife to recover for an assault committed upon the wife. The plaintiff obtained an order of arrest ; which the defendant now moved to vacate.

BOSWORTH, J.—The defendant moves to vacate the order of arrest heretofore made in this action, and moves on the affidavit on which it was granted. That affidavit states that the defendant violently assaulted the said Bertha ; injured her severely ; and that the husband has sustained special damage, which is stated.

The defendant insists that there is a misjoinder of parties ; that if the action be treated as one to recover the husband's special damage, he alone should sue ; and that if it be an action to recover damages for the injury to the wife, she should be the sole plaintiff. He further insists that a demurrer for the

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misjoinder would be sustained, and that the order should therefore be vacated.

The statute of 1860 (ch. 90, § 2), provides that any married woman may sue in her own name to recover damages for any injury to her person, the same as if she were sole; and that the damages recovered, or received on a settlement, shall be her sole and separate property. Assuming that she should sue alone, it is not clear that the defect can be reached by demurrer. (7 *Abbotts' Pr.*, 41; 17 *N. Y.*, 592; 16 *How. Pr.*, 195.) The authorities on this point seem to be conflicting. But assuming that a demurrer will lie, I think the plaintiffs would be allowed to amend the summons and complaint on terms. Inasmuch as the affidavit shows a cause of action, and the only defect is that there is one plaintiff more than there should be, and as that defect is amendable, I do not think the motion should be granted.

It is denied, but without costs.

THE PEOPLE *on rel.* THE COMMISSIONERS OF RECORDS *a.* THE SUPERVISORS OF N. Y.

Supreme Court, First District; General Term, September, 1860.

TAXES.—MANDAMUS.

Although a statute under which public expenses are incurred, may be unconstitutional, a tax may properly be levied to meet the expenses.

The act of April 17, 1860, imposes on the supervisors of the county of New York the duty of collecting the expenses of the Commissioners of Records.*

Of the cases in which the imposition of a tax may be compelled by mandamus.

Appeal from an order granting a mandamus.

Pursuant to chapter 407 of the Laws of 1855, the Commissioners of Records incurred expenses in executing the duties

* See a former decision in this matter, 10 *Ans.*, 288.

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devolved upon them, and made contracts for copying and printing the Indexes of Records in the register's office; and, in 1859, made application to the Board of Supervisors to raise the amount necessary to enable them to complete their duties under the statute.

The Board of Supervisors refused to do so, on the ground that the act of 1855 was unconstitutional.

Thereupon the Legislature, in 1860 (ch. 509, § 6), enacted that the Board of Supervisors be empowered to cause to be raised and collected the further sum, not exceeding \$80,000, to meet and pay whatever sum, up to that amount, might be found due to the contractors with the Commissioners of Records; and that the comptroller be authorized to pay the amount when the same shall be judicially determined.

This provision is part of the general tax-levy for the year 1860, and was passed on the 17th of April, 1860.

On the 22d of May, 1860, the Commissioners of Records certified to the comptroller and the Board of Supervisors, that there was due to the contractors for work under said act of 1855, the sums of \$65,783.51, \$1,953, \$1,645.43, and \$2,562.32, and required said Board of Supervisors to cause said sums to be raised pursuant to the said acts of 1855 and 1860, which the Board of Supervisors, up to 26th of July, 1860, neglected and refused to raise.

On the 26th of July, 1860, an order was granted for the Board of Supervisors to show cause on the 6th of August, why a mandamus should not issue to them, commanding them to raise the said sums.

That motion was argued before Mr. Justice Sutherland, who, on the 10th of September, 1860, decided that the motion be granted, and the mandamus asked for, issue.

SUTHERLAND, J.—The grant by the Legislature, of an official power, involves a corresponding public duty; and where the power is not expressly discretionary, its exercise is a peremptory public duty.

The mere constitutional grant of the power, without any express or positive injunction of its exercise, makes its exercise a peremptory duty, when, or as, an occasion for its exercise arises; unless the statute conferring the power, expressly leaves it to

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the discretion of the officer or officers upon whom the power is conferred, whether he or they shall, or shall not, exercise the power.

Public official powers must be supposed to be granted from public motives, and for the public good, and their exercise is not a matter of discretion, unless expressly made so.

It follows, that section 6 of the act of April 17, 1860, entitled, "An act to enable the Board of Supervisors of the county of New York to raise money by tax for city purposes," &c., is in effect, so far as it relates to the Board of Supervisors, a legislative mandamus, directing them to cause to be raised and collected by tax, "the further sum, not exceeding eighty thousand dollars," therein mentioned, either absolutely, and without any condition or limitation whatever, or conditionally; that is, upon the judicial determination referred to in the section.

The section is as follows:

SEC. 6. "And the said Board of Supervisors are hereby empowered to cause to be raised and collected, in manner as aforesaid, the further sum, not exceeding eighty thousand dollars, to meet and pay whatever sum, up to that amount, as may be found due to the contractors with the Commissioners of Records of the city and county of New York. The comptroller is authorized to pay said amount, when the same shall be judicially determined."

The counsel for the supervisors insist, that they are not authorized or obliged by this section to cause any sum whatever to be raised by tax, until the amount (if any) due to the contractors with the Commissioners of Records, has been *judicially determined*. If this is the true construction of the section, or if, indeed, the judicial determination of any question or matter whatever, is by the section made a condition precedent of the duty to raise by tax any sum whatever for the purpose mentioned in the section, then the mandamus asked for by the relators cannot be granted, for it is conceded that there has been no such judicial determination.

The question then is: Were the words, "when the same shall be judicially determined," intended to qualify the authority given by the section to the Board of Supervisors, to raise a certain amount by tax, or exclusively the authority given by it to the comptroller, to pay such amount when raised?

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The section is certainly loosely and obscurely drawn, but it is quite clear to me that these words were intended to qualify exclusively the authority given to the comptroller to pay over the money to the relators, or to the contractors with them when raised.

"The comptroller is authorized to pay said amount when the same shall be judicially determined," are the words of the section relating to the comptroller.

When what is judicially determined? What do the words "*the same*" refer to? The Board of Supervisors and the counsel were certainly quite excusable for thinking that these words refer to the *amount*, and that the judicial determination contemplated was a judicial determination of the *amount* due to the contractors with the Commissioners of Records. Such would be the natural and grammatical construction of the sentence; but the Legislature do not always speak good grammar, or mean what they say; and I am confident that in this instance, such a construction would not be in accordance with their real intention.

We must assume that the Legislature adopted and passed this section with knowledge of the act of the 13th of April, 1855, appointing the Commissioners of Records, and of its provisions; and with knowledge also of what was notorious, that the commissioners had entered into certain contracts with parties for the execution of the work, or the accomplishment of the purposes contemplated by the act; that considerable work had been done under their contracts, for which pay was claimed; that application had been made to the Board of Supervisors to raise by tax a sufficient or certain amount to make such payments; that the supervisors had refused so to raise any amount for that purpose, mainly, if not solely, upon the ground that the act was unconstitutional and void; that an application had been made to the Supreme Court for a mandamus to compel them so to raise a certain sum for such purpose, which had been refused. We must, I think, assume that section 6, of the act of 1860, in question, was passed at the instance of the commissioners, or of the contractors who claimed pay under their contracts with the commissioners, in view of this controversy with the Board of Supervisors of this constitutional question, and, perhaps, of other questions for judicial determination, aside

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from the mere ascertainment of the *amount* due for work under the contracts which had been, or might be, raised and agitated.

It does not appear that any question as to the construction of the contracts, or either of them, has ever been raised or suggested. Assuming the original act, appointing the commissioners, to be constitutional, and the contracts under which the work has been done, plain and unequivocal, why should a *judicial* determination be required to ascertain or find the amount due for work under the contracts? It does not appear that there ever had been a *question* as to the amount of work actually done, or as to the rate of compensation, or as to the time or times of payment, and I cannot think that the Legislature passed the section of the act of 1860, in question, in view of any such question. From the nature of the work, I cannot assume that the Legislature thought there would be any controversy as to the amount of work actually done; and the rate of compensation, and time or times of payment, being fixed by the contracts, the supervisors or their clerk could ascertain the amount due for the work actually done, without the aid of a judge or court. Indeed, if in the course of a legal proceeding or action it should become necessary for the court to ascertain the amount due to the contractors under the contracts, such amount would probably be ascertained by a referee appointed for that purpose, and not by the court. I think, therefore, if any meaning or effect at all is to be given to the words, "when the same shall be judicially determined," as used in section 6 of the act of 1860, that they must be held to refer to the judicial determination of the constitutional question above referred to, or, at all events, to the judicial determination of some question or questions other than as to the *amount* due for work done under the contracts. I think they must be held to refer to the judicial determination of some question or questions as to whether *any* sum or amount was *justly* or *legally* due or payable, or collectable under the contracts, assuming their construction, the amount of work done under them, and the rate of compensation, free from doubt; in other words, to some question or questions as to the legality of the contracts, or the authority of the commissioners to enter into them so as to legally bind the city to fulfil them.

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If these views as to the construction of section 6 of the act of 1860 are correct, it follows on the undisputed facts which appear from the moving papers in this case, that it is the duty of the Board of Supervisors to cause to be raised by tax the sum of \$72,034.26, due for work done under the contracts,—assuming the contracts to be legal, the original act of 1855, appointing the commissioners, to be constitutional, and the contracts to have been authorized by it; but it also follows from this construction, that the comptroller will not be authorized to pay the money, when so raised, to the relators, or to the parties who have done the work, until the judicial determination referred to in the section has been had or obtained. I look upon this section as intended to compromise or settle the controversy as between the relators, or their contractors, and the Board of Supervisors. It makes it the duty of the Board of Supervisors to raise by tax the amount found due. That amount, when so raised, is to remain in the hands of the comptroller to abide the judicial determination. There are some technical objections made to the granting of a peremptory mandamus in this case, which it is hardly worth while to notice.

I will say, however, that the supervisors, when called upon by the relators to raise, or to take the necessary steps to raise by tax the sum of \$72,034.26, alleged to be due for work under the contracts, do not appear to have then questioned, and do not now on this motion show any grounds for questioning, the *amount* due, if the contracts were legal, and made in pursuance of a constitutional law, and binding on the city. When so required to take the necessary steps to raise this amount by tax, it does not appear that in words they refused to do so, or ever have so refused; but I think that the relators had a right to treat their neglect or delay in taking these steps, and their action subsequent to the requisition, in referring the matter to a committee, &c., as equivalent to a verbal refusal to comply with the requisition. I do not say that this delay or action of the supervisors was without excuse, for certainly section 6 of the act of 1860, under which the requisition was made, is sufficiently obscure to have justified considerable hesitation in a compliance.

The result of my construction of this section is, that the

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motion of the relators must be granted, and the mandamus asked for, issue.

From that decision the defendants appealed.

A. R. Lawrence, Jr., for the appellants.

W. Fullerton, James T. Brady, and John W. Edmonds, for the respondents.—I. The question of the constitutionality of the act of 1855 is not involved in this application; for, even if the act of 1855 is unconstitutional, it certainly is constitutional and competent for the Legislature to direct the Board of Supervisors to raise money to defray the expense of preserving the county records. And that is all which this act professes to do.

II. The act of 1860 does not prejudice the constitutional question, but leaves it open to be contested before payment.

III. The act of 1855 is not unconstitutional. (*Draper a. Wood*, 15 *N. Y.*, 532; *Per HARRIS, J.*, at special term in Central Park Case.)

IV. The act of 1860 is imperative on the Board of Supervisors. (*People a. Westchester*, 12 *Barb.*, 452; *Regina a. Tithe Commissioners*, 14 *Q. B.*, 474.)

The words "are empowered" mean, must or shall, because public interests or rights are concerned; and because the public or third persons have a claim *de jure*, that the power shall be exercised. (1 *Kent's Com.*, 5 ed., 467, note D.; *Newburg Turnpike Co. a. Miller*, 5 *Johns. Ch.*, 113; *Rex a. Barlow*, 2 *Salk.*, 609; *Blackwell's Case*, 1 *Vern.*, 152; *Malcolm a. Rogers*, 5 *Cow.*, 193; *Minor a. Michigan Bank*, 1 *Pet.*, 64.)

By THE COURT.*—ALLEN, J.—By section 6, of the tax law of 1860 (ch. 509, p. 1024 of Session Laws), a duty was imposed upon the Board of Supervisors of the county of New York, to cause to be raised and collected during the current year, and in the manner in which the other taxes are levied and collected within the city and county, a sum not exceeding eighty thousand dollars, to pay such sum as may be found due to the contractors with the Commissioners of Records appointed by the act of 1855 (*Sess. Laws*, 763). The act is imperative, leaving no

* Present, SUTHERLAND, BONNEY, and ALLEN, JJ.

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discretion in the defendants whether they will exercise the authority conferred.

Although the language of the act is simply enabling, yet as it confers a power which concerns the public, as well as individuals, it is not merely permissive, but is mandatory. (*Rex a. Barbour*, 2 *Salk.*, 609; 1 *Kent's Com.*, 467; *Newburg Turnpike Co. a. Miller*, 1 *Johns. Ch.*, 113.)

The only discretion vested in the supervisors is, as to the amount within the prescribed limits which they will cause to be levied and collected upon the taxable property of the county for the purposes named, and that is not an arbitrary discretion, although in its exercise their determination would not be the subject of review.

As public officers they are required to exercise their best judgment as to the amount which will probably be necessary to pay the claims intended to be provided for, leaving it for other officers or tribunals to decide the ulterior question, whether, by law, the contractors named in the act be entitled to recover any part of it.

The object of the Legislature was to provide a fund for the alleged claim when the amount should be judicially determined. Whether it was wise or necessary to make provision for collecting from the taxpayers, and placing in the custody of the financial agents of the city and county, a fund for the payment of a contested claim in advance of its adjustment, is not for us to decide.

It is enough that the Legislature, in the exercise of its taxing powers, directed it to be done. Conceding the act of 1855 to be unconstitutional, and all contracts under it to be invalid, it does not follow that the Legislature might not, adjudging the services to be performed under the act to be valuable to the county, direct their payment absolutely, and cause a tax to be levied for that purpose. (*Town of Guilford a. Supervisors of Chenango County*, 3 *Kern.*, 143.)

They have, however, only directed an amount to be levied and collected, by way of making provision for the payment of the claim when the amount shall be "judicially" determined.

The constitutionality of the law of 1855, or the validity of the acts of the commissioners under it, are not before us. We do not undertake to decide, and cannot upon this appeal decide,

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whether any sum whatever, and if any, what amount, is due or should be paid to the claimants; and these questions cannot be determined by the Board of Supervisors, for the reason that the Legislature has referred them for decision to another tribunal.

For the purpose of their own action, the supervisors could adjudge what sum would probably be required on the contingency that the claim should be declared valid.

It is not claimed that the amount required by the order appealed from to be raised, is unreasonable, or larger than should be raised, if any action is taken under the section.

On the contrary, it is impliedly, if not expressly conceded, that in the exercise of a sound discretion, this amount, if any thing, should be raised.

In the affidavit of the president of the board, read upon showing cause against the order, it is not claimed that there is any dispute or doubt as to the amount which will be necessary to pay the claim, if the claimants shall be adjudged entitled to any thing. The objection is rather to the validity of the act of 1855, and to the power of the agents of the county to incur expenses chargeable upon the county when there is no appropriation in the treasury to pay them.

It is true, that it is stated in the affidavit that the board has no means of ascertaining whether the expenses had been incurred, or the amount of such expenses, other than the certificate of the commissioners.

This, however, is the evidence contemplated by the act of 1855, and unimpeached, is, *prima facie*, sufficient to authorize the action of the supervisors. It is not pretended that the supervisors were delaying action for the want of more definite or reliable information. The counsel for the appellants does not, in his printed points, object that the order should not have named the amount, but simply directed the defendants to raise such sum as they should judge to be necessary.

Perhaps the mandamus might have been in that form, had it been suggested that the supervisors questioned the amount, and desired to pass upon it.

But the contest is, really, as to the duty of the supervisors to act at all, rather than as to what sum they shall raise; and as they are not to judge upon the validity of the claim, they are

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not at liberty to refuse to name the amount which will probably be necessary, if the claim is valid, to satisfy it. It is claimed that the application is premature, and that there has been no neglect or refusal by the defendants to justify the mandamus.

If this were so, it would best promote public interests to pass upon the merits of the controversy, rather than dispose of the matter upon technical objections, which would only lead to a renewal of the application, and another process of litigation, during which the assessment levy of the annual tax must be suspended, and possibly to the great detriment of the county. But without imputing any criminal or intentional neglect of duty on the part of the defendants, I think the case shows a palpable mistake on their part as to their duty, and a delay and omission to act sufficient to authorize the order of the court to put them in motion. The delay evidently arises from a misconstruction of the act, and of their duty under it, and was not a delay merely because a proper time for action had not arrived. They had not acted, simply because they did not consider themselves bound to act.

And it must be borne in mind, that the provision sought to be enforced, is only operative for the current year, it being a part of the act providing for the annual tax-levy upon the county; and that the whole county tax authorized by the act must be levied in a single assessment; and that if this tax is omitted in the tax-levy for the year, and the annual assessment and tax-roll completed without it, the parties interested are remediless. Again, there is no mode of compelling an immediate compliance with, or a direct denial of, any request or demand upon the supervisors as a body. Hence their refusal to do a particular act, if they do not choose to come to a direct vote, and to which they cannot be brought by any individual, must be determined by their acts, and omissions to act. An individual is not called upon to await a formal vote, to which they may never come, when by so waiting the time and opportunity for action may be lost; as in this case, the residue of the tax for the year may be assessed and collected, and this omitted by the inaction of the supervisors. I am of opinion, that without imputing any bad faith to the supervisors, or any intention to disregard or evade the law, the circumstances justified the application.

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The certificates and vouchers were prepared about May 22, 1860, and at a meeting of the board on that day, were referred to the committee on civil courts.

On the 10th of July, that committee reported that it was inexpedient to raise the sum claimed, because the matter had not been judicially determined; and on the 17th of July, the report was recommitted to the same committee, but for what purpose does not appear. It was evidently, however, not merely to ascertain the amount, or probable amount, of the claims.

On the 7th of August, after the issue of the first order on their proceedings, the board had a meeting, and took no action in the premises. I think the relators were entitled to more.

It is also objected that the order should have been for an alternative, rather than a peremptory mandamus.

But this was a case calling for prompt action in view of the public interests, as the tax-levy for the year was awaiting the decision. There was no dispute about facts, and it was a proper case for the court, in the exercise of a sound discretion, to make the writ peremptory in the first instance, the parties having been fully heard upon the merits. (*People v. Judges of Cayuga County*, 2 *Johns. Ch.*, 68; *Exp. Rogers*, 7 *Cow.*, 526.)

There was no reason for subjecting the parties to the delay incident to a formal procedure.

It is proper to say that we have only to do with the first clause of the section, which relates to the action of the Board of Supervisors. With the other clause, which concerns the comptroller and the final disposition of the fund, we have nothing to do. Should we undertake to give a construction to the whole section, and declare the duty of the comptroller, we should go beyond our jurisdiction, and our declaration would be inoperative. There may well be a diversity of opinion as to the true construction of the last clause of the section; but it can only be settled when the money shall be in the treasury, and the comptroller shall be called upon to act. Perhaps by that time an explanatory act will have been passed, which, if prepared with more care and greater skill than this, and with more regard to precision in the use of words, will relieve the comptroller, as well as the courts, from the necessity of spelling

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out the legislative intention, which is always difficult to do from acts unartificially drawn.

The order should be affirmed, without costs.

SUTHERLAND, P. J.—Concurs. .

BONNEY, J.—I concur with a majority of the court in opinion that the act of April 17, 1860, imposes upon the supervisors *the duty* of raising and collecting *not* exceeding \$80,000, to pay whatever sum may be found due to the contractors, with the Commissioners of Records, and that the constitutionality of the act for the appointment of said commissioners, passed April 13, 1855, cannot on this application be questioned.

But to authorize the interference of this court by writ of mandamus, as I understand the law, the relators must show a demand or request to perform the imposed duty, *and a refusal by the supervisors to comply therewith*, either by express words, or by such words and acts as satisfy the court that for some insufficient reason compliance is withheld, and a determination evinced not to do what is required. I think the papers in this matter show a sufficient request, but I am not satisfied with the evidence of refusal. (See *Tapping's Mandamus*, 282, &c., and cases cited.)

Again, the act of April, 1860, section 6, as I construe it, vests in the supervisors, and not in this court, the power to determine in advance, what amount, not exceeding eighty thousand dollars will be sufficient to pay the sums which "*may be found due*" to said contractors; and, consequently, in my opinion, the mandamus (if granted) should command the supervisors to perform the duty required of them, and raise such amount as they shall determine to be sufficient for the purpose specified.

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LOVELL *a.* MARTIN.*New York Common Pleas ; General Term, September, 1860.*

ARREST.—FRAUD IN CONTRACTING DEBT.

Where defendant after having borrowed money on a promise to apply it to a specific use, converted it to another.

Held, that he was liable to arrest for a fraud in contracting the debt.

Appeal from an order refusing to vacate an order of arrest.

The facts are stated in the opinion.

BY THE COURT.—HILTON, J.—I can perceive no reason for vacating the order of arrest granted in this case. It appears that the defendant procured the money of the plaintiff upon representing that he intended with it to establish a certain business, and employ the plaintiff's husband as clerk, at a salary equal to one-half of the profits to be derived from it. After thus getting possession of the money, instead of using it in establishing the business contemplated, he appropriated it to his individual use, and thus violated the promise upon which he obtained it. I think upon these facts we are justified in assuming that the representations upon which the plaintiff was induced to part with her money, were made with a fraudulent intent, and with a preconceived design to defraud her.

But it is claimed that the promise was executory, no subsequent state of facts can afford any presumption of its having been made with a fraudulent design and intent, unless accompanied by proof of the actual state and condition of the mind of the defendant at the time the promise was made; and as here, this proof is wanting, the case does not, therefore, fall within the provisions of the Code (§ 179), which authorize the arrest of a party.

The answer to this view is, that the language of the section is broad and general. It allows the arrest of a party in every case where he has been guilty of a fraud in contracting the

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debt, or incurring the obligation for which the action is brought, and is intended to cover all cases where, from the facts presented, it can be judicially determined that an actual fraud was intended and accomplished. To say that it must be confined to those cases when the proof with absolute certainty shows that the intent of the party at the time of incurring the obligation was to perpetrate a fraud, and that such an intention cannot be presumed from subsequent circumstances, would in effect so limit the application of the section as to render it comparatively useless, either for the purpose of deterring parties from committing a fraud, or as a means of punishment in cases where fraud is established. In very many instances it is impossible to show the intent which animated the party at the time he incurred the obligation, except from his subsequent conduct and acts, and these are frequently such as would bring conviction to any mind, that a fraud was perpetrated and intended; and thus, in the present case, the money was procured by inducing the plaintiff to believe and put faith in the representations of the defendant, that he intended with it to establish a business which would enable him to give employment to her husband, while at the same time she would be secure from loss, as the business would in its very nature be so safe and lucrative as to enable him to return the amount loaned at the end of a year. Having induced this belief, and by it obtained the money desired, instead of using it as promised, he applied it to other and entirely different purposes; and this is, in my opinion, sufficiently established by a reasonable inference, that he intended at the time to practise a fraud upon the plaintiff. He certainly knew that if he had represented that he wanted the \$5,000 for his individual purposes, that he intended going into no business, and did not purpose giving employment to her husband, she would not have parted with her money; but knowing her desires, he shaped his promises accordingly, and thus by fraud and deception incurred the obligation now sought to be enforced in this action.

Were this not so, he would have returned her the money when he found he could not fulfil the promises upon which he obtained it; and not having done so, renders him liable to the consequences which the law awards for such conduct.

Order at special term affirmed, with \$10 costs.

REED *a.* BUTLER.*New York Common Pleas; General Term, July, 1860.*

MOTION.—ABATEMENT AND REVIVAL.

If a party dies pending a motion, the decision of which will not finally determine the action, an order of revival must be had before the decision of such motion can be entered.

The plaintiff moved to strike out the answer of defendant, and after the motion had been argued and submitted to the court, he died.

BY THE COURT.—DALY, J.—The plaintiff having died before the motion was decided, no further proceeding could be taken in the cause until a motion was made to revive the suit, and the order entered was a nullity. The death of the plaintiff after the motion was argued, was no reason for entering up the order as of the day of the argument. In courts of equity it is the practice, when a party dies after a cause has been submitted upon the final hearing, for the court, notwithstanding, to go on and render its decision, and direct a final decree to be entered up as of the day when the cause was submitted for decision. (Davis *a.* Davis, 9 *Ves.*, 461; Campbell *a.* Mesier, 4 *Johns. Ch.*, 342; Wood *a.* Keyes, 6 *Paige*, 478.) This practice was adopted directly from its analogy to the change which had been effected by statute in the practice of the common-law courts. At common law the action abated by the death of either party, but by the 17 of Car. II. (S. S. 1, 8), and 9 of W. III. (C. 11, 86), if it occurred after verdict or after interlocutory judgment, judgment might be entered up in the manner prescribed by the statute. There was a reason, however, for the course, which does not apply here. When a cause is submitted upon a final hearing, there is nothing more to be done by either party in the presentation or defence of it. The parties have been fully heard. The court being possessed of the whole case, may make

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its decree; and if, after that, something remains to be done, as to enforce the decree, there must be a revivor. But in this case the cause was not at issue. The motion was to strike out the defendant's answer. It was heard before the plaintiff's death, but as the decision of it would not put an end to the suit, no order could be entered striking out the answer until an order was first obtained, reviving the suit in the name of the proper party.

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Supreme Court, First District; General Term, August, 1860.

CORPORATION.—LIABILITY OF DIRECTORS FOR OVER-ISSUE.

Directors of a corporation, who issue unauthorized certificates of stock, are not liable directly to ultimate purchasers of the stock, who made no contract with them, and did not act on their representations.

Appeal from order overruling demurrer to complaint.

The substance of the complaint is stated in the opinion.

The defendants severally demurred to the complaint, on the ground, among others, that it did not state facts sufficient to constitute a cause of action.

These demurrers were overruled by the special term, with costs. The case is reported, 6 *Ante*, 270, note.

From these orders overruling the demurrers, the defendants appealed to the general term.

J. M. Van Cott, for the appellants.

S. W. & R. B. Roosevelt, for the respondents.

BY THE COURT.*—The complaint in this action substantially states, that "The Parker Vein Coal Company," a foreign

* Present, SUTHERLAND, BONNEY, and LEONARD, JJ.

corporation, by its act of incorporation, had a capital stock of three millions of dollars, divided into shares of \$100 each, and prior to April, 1854, had issued certificates of stock for such shares to the full extent of its capital, which certificates were outstanding and valid; that afterwards the defendants, as president and vice-president of the corporation, issued and sold stock beyond the authorized capital, and that the plaintiff afterwards bought from parties (not named in the complaint) 3,000 shares of such over-issued stock, believing it to be genuine; but that it is void in law, and of no value; wherefore the plaintiff claims that the defendants are liable *to him* for the price paid therefor, with interest.

The complaint alleges that the defendants, by the issue and sale of such spurious certificates of stock, held out the false pretence that the purchasers thereof would obtain thereby the rights and privileges of stockholders in said corporation; but the complaint does not allege that the defendants, or either of them, issued or transferred the 3,000 spurious shares, or any part thereof, or any spurious certificates, directly to the plaintiff.

There is an allegation in the complaint that the plaintiff, at various times during the months of April and May, 1854, bought certificates in the aggregate for 3,000 shares of stock, paying therefor \$19,250, supposing them to be genuine; but it is not alleged or pretended in the complaint that the plaintiff bought these certificates, or any of them, of the defendants.

There is an allegation in the complaint that the plaintiff was induced to pay the sum aforesaid, by the fraudulent acts and false pretences of defendants; but no allegation that the false pretences were made by the defendants to the plaintiff; or that the fraudulent acts consisted in a transfer of the spurious certificates from the defendants to the plaintiff.

The allegation in the complaint is, that the spurious certificates were thrown into the market by the defendants, and that the plaintiff was induced to pay the sum aforesaid by the fraudulent acts and false pretences of defendants.

The substance and theory of the complaint plainly is, that the defendants, officers of the corporation, wrongfully and fraudulently issued false certificates of stock beyond the chartered power or right of the corporation; that in the course

of time, a parcel of these false certificates, purporting to represent 3,000 shares of genuine stock, came into the hands of the plaintiff by purchase, not of the defendants, but of third parties, who had taken them either directly or remotely from the defendants.

The question is, whether the complaint shows any cause of action, on the part of the plaintiff, against the defendants ?

I think it does not. There is no privity between the plaintiff and the defendants. The plaintiff has remedy against the party or parties of whom he purchased the pretended stock, or false certificates for pretended stock. (*Kendall v. Stone*, 1 *Seld.*, 14 ; *Gompertor v. Bartlett*, 75 *Eng. C. L. R.*, 849 ; *Kempson v. Saunders*, 4 *Bing.*, 5 ; *Nockrell v. Crosby*, 3 *Barn.* ; 2 *Cross*, 814.) The party, or parties, to whom the defendants directly issued the false certificates, has, or have, his, or their, remedy against the defendants ; but the plaintiff has no remedy against the defendants on the facts stated in the complaint. On these facts it must be presumed that the defendants intended to injure, and did injure, the party or parties to whom they directly issued or transferred the certificates.

The plaintiff's case is not within the principle of the decision in *Thomas v. Winchester* (2 *Seld.*, 397) ; but it is, I think, within the principle of the decisions in *Mechanics' Bank v. N. H. R. R. Co.* (3 *Kern.*, 599) ; *Farmers and Mechanics' Bank of Kent County v. Butchers and Drovers' Bank* (16 *N. Y.*, 125) ; and *Zabriskie v. Smith* (3 *Kern.*, 330).

The order of the special term, overruling the defendants' demurrers, should be reversed, with \$10 costs, and the defendants should severally have judgment on their demurrers, with costs.

Hamann v. Keinhart.

HAMANN v. KEINHART.

Supreme Court, First District ; At Chambers, October, 1860.

CONFESSION OF JUDGMENT.—SUFFICIENCY OF STATEMENT.

A statement for judgment by confession, referring to a schedule annexed,—
Held, insufficient, for not showing the necessary facts.

Motion to set aside a judgment by confession.

LEONARD, J.—The statement in the confession sets forth the defendants' indebtedness to the plaintiff for money paid, laid out, and expended by the plaintiff for the defendants at their request, at the times and for the amounts mentioned in a schedule annexed, and for liabilities incurred by the plaintiff for the defendants as indorser of the notes mentioned in the schedule, said sums being paid, and liabilities incurred for the demands of the persons mentioned in the schedule against the defendants.

The statement, by its terms, refers to, and is dependent on, the specifications of the schedule for a compliance with the Code (§ 383). Does it show the facts out of which the indebtedness arose, and that the sum is justly due, or to become due, as required by subdivision 2 of section 383? and, so far as the judgment secures a contingent liability, does it state the facts constituting the liability, and that the sum confessed does not exceed the same, as required by subdivision 3?

The first portion of the schedule, amounting to \$7,175.24, probably refers to certain promissory notes, although it is nowhere stated that such is the fact.

Assuming that they represent promissory notes, the schedule gives the dates, names of the makers, the names of those to whose order they are payable, the time at which they are made payable, and the amounts. It appears that the notes, some thirty in number, were all over-due when the statement was sworn to.

It does not, however, appear how the plaintiff is, or ever was, liable thereon. On several of the notes it does not appear that the defendants are either makers or indorsers, or that they are in any manner liable thereon. Why then is the plaintiff a creditor thereon? The statement alleges that the confession is made for money paid, and liability incurred for demands of persons mentioned in the schedule against the defendants. Referring to the schedule, we do not find any one mentioned there as persons having demands against the defendants.

If the confession is for money paid by plaintiff for the defendants, to the amount of this \$7,175.24, then the dates when paid, and the persons to whom paid, are not furnished.

If the plaintiff is the holder of these notes, then they are evidence of debt against the defendants, and it was necessary to state the facts concisely out of which the debt arose. The statement and schedule are defective in these respects.

From the language in the "recapitulation" of the schedule, it may be fairly inferred that Hamann, the plaintiff, is the holder of the notes amounting to the said sum of \$7,175.24. If so, they do not represent money paid, or liability incurred, by the plaintiff for the defendants.

The schedule also embraces eight notes, amounting to \$2,099.79, made by the defendants, indorsed by the plaintiff, for which he is responsible (as the schedule states), not due at the time the confession was made.

By the terms of the statement, the schedule will inform us who are the persons having demands against the defendants for which the liability of the plaintiff has been incurred. There is, however, an entire failure in this respect. It is not stated for what debt the liability was incurred, or to whom either of the notes were given, or whether they were in fact outstanding. There is a failure here in stating the facts constituting the plaintiff's liability as required by subdivision 3 of section 383, under which this part of the judgment comes.

The three last specifications in the schedule do not state whose note is referred to, or how the plaintiff is liable therefor.

In all these respects the statement and confession are radically defective.

The judgment must be set aside.

LEWIS a. FOX.

New York Common Pleas; General Term, October, 1860.

COSTS.—APPEAL FROM MARINE COURT.

What costs may be allowed by the Marine Court, and by the Common Pleas on appeal from the Marine Court.

Appeal from a judgment of the New York Marine Court.

BY THE COURT.—HILTON, J.—This action was commenced in the Marine Court by warrant of attachment issued by one of the justices of that court, under the provisions of sections 31 and 35 of the act to abolish imprisonment for debt, &c., passed April 26, 1831. On the return of the warrant, the plaintiff had judgment, which, on appeal to the general term of that court, was reversed, and judgment finally given for the defendant, upon the ground, as it seems, that the affidavit on which the attachment was granted, did not state sufficient to authorize the issuing of such a process, and, therefore, the court acquired no jurisdiction of the suit. On the reversal, the general term awarded the defendant \$48.96 costs and disbursements, and for which judgment has been entered.

The plaintiff having appealed, asks us to review the judgment in respect to the sufficiency of the affidavit referred to; and also as to the right to expenses incident to the filing of any transcript of the judgment. These items, added to the justice's fee of \$2 for his return, constitute all the fees of officers and disbursements which can be allowed by us on appeal from justice's court, and it follows that the Marine Court cannot, under the provisions of the act of 1853, allow any other.

But it is said, that by a rule of that court, an appellant is required to print his case and points upon an appeal taken to the general term, and that this expense must, therefore, be considered as a necessary disbursement, to be allowed as part of the costs to be awarded in the final judgment.

Our only answer to this is, that the Legislature has restricted this court in the amount of costs and disbursements which we may award upon appeals from justice's court; and the Marine Court, as already shown, is restricted in like manner, and to the same extent. By section 365 of the Code, we are required to hear all such appeals upon the original papers, and it is therein expressly declared, that no copy need be furnished for the use of the court. A provision of so positive a character we have always supposed denied the Marine Court the power to award the costs thus imposed upon him.

Upon the first ground stated, we are of opinion that the affidavit was clearly insufficient to justify the issuing of the attachment, and the Marine Court was right in so holding.

As to the second, a brief reference to the several statutes upon the subject of costs in the Marine Court, will show that the sum allowed is much beyond the power of that court to award to a respondent upon appeal in any case. The act of July 21, 1853 (*Laws of 1853*, 1, 165), under which the Marine Court derives the power to review upon appeal at general term the judgments rendered by any of its justices, allows \$50, the same costs and disbursement on such appeals as on appeals from justices' courts to this court; and these are specified in section 371 of the Code, which provides that there shall only be allowed on such appeals to the appellants, on reversal, \$15; and to the respondent, on affirmance, \$12, with the fees of officers, and disbursements in addition, and which consists of the sheriff's or constable's fees. And the sums paid to the clerk during the progress of the cause, or for any copies of papers made by him, and necessary to be procured, together with the right to impose upon either party to such appeals any expense, in the way of either copying or printing of papers to be used on the argument of the appeals before us; and we have no doubt that if we should require such an expense to be undergone, the party incurring it would not be entitled to have it allowed him, as a disbursement, within the meaning of section 371.

Entertaining these views, we are of opinion that in the present case, the Marine Court has exceeded its powers by giving judgment in favor of the defendant for a greater amount of costs and disbursements than the law authorized.

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The judgment must, therefore, be reduced to the costs and disbursements which are usually allowed in this court; and thus modified, it will be affirmed, without costs of this appeal to either party.

THE PEOPLE *v.* THE ALBANY AND VERMONT
RAILROAD CO.

Supreme Court, Third District; Special Term, October, 1860.

ATTORNEY-GENERAL.—INJUNCTION.—RAILROAD COMPANY.—
FRANCHISE.

The People, by the attorney-general, may bring an action to compel a chartered railroad company to keep its road in repair and in operation.

▲ railroad company, formed under the general railroad law of this State, have not a right to abandon any portion of their road whenever they choose.

▲ railroad company may be compelled to continue their business by an injunction forbidding them to discontinue it.

Such an injunction may be granted at the suit of the People, if it is not shown that the discontinuance is necessary to avoid pecuniary loss.

Motion to continue until the hearing 'a preliminary injunction previously issued, restraining the defendant from removing the iron rails upon some twenty miles of the eastern portion of its road.

In 1851, a corporation, known as the Albany Northern Railroad Company, was organized under the general railroad act, to construct a railroad from the city of Albany to Eagle Bridge, in Rensselaer county. The road was completed and put in operation somewhere about 1853, and was run until September, 1859. This railroad was sold under a mortgage foreclosure, on the 19th of September, 1859. The purchaser, with certain associates, on the 6th of October, 1859, organized the road anew, over the same track, by its present name of the Albany and Vermont Railroad Company; but, with the exception of some twenty days, the defendant has not run, or in any manner

operated, the eastern portion of its road since that time, and the defendant has removed a portion of the iron rail therefrom. On the 12th day of June, 1860, the defendant leased to the Rensselaer and Saratoga Railroad Company, during defendant's corporate existence, that portion of its road lying between the city of Albany, and a point one thousand feet north of its intersection with the Rensselaer and Saratoga road, at an annual rent of twenty thousand dollars, with a clause in the lease, making it void at the option of the lessee, in case any part of the defendant's road, east of the Hudson River, should be operated to carry freight or passengers. This provision applies to that portion of the road now in controversy.

It appears that the defendant's road originally cost over two millions of dollars, more than half of which was contributed by the citizens of Albany, and that the city, in its corporate capacity, advanced \$300,000 towards the completion of the road, but that it cost its present owners only about one hundred and sixty thousand dollars; that a responsible offer to hire said road and its property for ten years, at an annual rent of twenty-one thousand dollars, and to keep the same in good running order, was made to defendant before it made the lease above alluded to. This offer was declined.

It also appears that parties owning stock in the Rensselaer and Saratoga Company, uniting with stockholders in the Troy and Boston Company, or that the friends of those roads, in April, 1860, purchased a majority of defendant's stock, and thereafter controlled the defendant's road, and under their direction the lease was made to the Rensselaer and Saratoga road, and the track on the eastern portion of defendant's road is directed to be taken up.

In this way all connection by defendant's road from Albany to Eagle Bridge and to Rutland, is cut off. Passage for all north or east of Rutland may be had to Albany direct by the way of Whitehall, over the Rensselaer and Saratoga road; and from Rutland to Eagle Bridge, and thence by way of Troy to Albany; but a transshipment of freights is thus made necessary to cross the river at Albany, and a large increase of expense thereby necessarily incurred.

J. Gibson and J. H. Reynolds, for the motion.

The People *v.* The Albany and Vermont Railroad Co.

J. B. Gale, A. B. Olin, and W. A. Beach, opposed.

PECKHAM, J.—The complaint herein, on behalf of the People, asks for an injunction, and also prays that the defendant may be compelled, by the decree of this court, to put its road in repair as to its eastern portion, and to operate the same. This case is novel in this country, and by no means free from difficulties.

By the present arrangement, the main purpose for which the defendant's road was originally constructed, is destroyed. Yet if no law has been violated, the remedy is not with the court.

Several objections are urged to this application, which I shall briefly consider.

First, it is said that the People, through their attorney-general, have no right to bring this action. The contrary has been held in this court in *The People v. The Mayor, &c., of New York* (19 *How. Pr.*, 145); a case entirely analogous in principle, and I shall be governed by that decision. The following are also authorities in the same direction: *The People v. The Mayor, &c., of New York*, an able opinion by Judge Hogeboom, on application for an injunction in reference to the Brooklyn Ferry; also, *Doolittle v. Supervisors of Broome Co.* (18 *N. Y.*, 160).

It is next insisted that the defendant has a right to abandon any portion of its road whenever it chooses, and the public is without remedy; that there is no imperative direction by any statute requiring its continued operation—hence, that this court has no power to compel defendant to repair its road. The defence has failed to find any statute authorizing a railroad company, absolutely at its pleasure, to abandon part of its road; and I am not aware of any common-law or inherent right to do so after the road is completed. The statute authorizes the directors of a road to change its route, or any part of it, by a vote of two-thirds of their whole members, if it shall appear to them that the line can be improved thereby. (2 *Rev. Stat.*, 5 ed., 677, § 26.)

The defendant insists that at a meeting of "more than a majority" of its directors, on the 29th ult., they resolved to discontinue that portion of their road lying east of Johnsonville, in Rensselaer county.

If this is claimed as an exercise of its right to change its route, it is a sufficient answer to say, that it does not appear that the change was made by a vote of two-thirds of its directors, and the resolution was, therefore, void. But the motion evidently refers to a change, not to a discontinuance of its route, or any part of it. This resolution recites that the track of defendant "is connected, at Johnsonville, with the track of the Troy and Boston road, and thereby, the same points of termination are reached by railroad communication, that have been, or may be reached, by the present line of the road of this company;" and as it is unprofitable and unnecessary for this company longer to operate that part of its road, &c., therefore, it is resolved to discontinue it.

This resolution entirely fails to comply with the statute authorizing an agreement to be made by two companies, "embracing for a portion of their lines, the same location of line," for the construction of so much of said line as is common to both, by one of said companies, and for the manner and terms upon which the business thereon shall be performed. Any road so connecting may alter and amend its articles of association, so as to terminate at the point of intersection, &c. These sections, especially the first, would seem to apply to roads not yet constructed, and an arrangement is to be made with the road constructing the single line, to do the business of the other for a certain distance on that line. (2 *Rev. Stat.*, 5 ed., 693, 694, §§ 68, 69.)

Here, no arrangement of that sort is pretended. In fact, it would be contradictory of the defendant's whole course of action, as it admits its intention to abandon, and not operate any part of its road east of its junction with the Saratoga road. Hence it could have no business to do at, or near, or east of Johnsonville, in regard to which it could make any agreement. There is a provision in the statute in regard to turnpike roads, authorizing them to discontinue any part of their road in the manner there pointed out. Thus, by implication, expressing the sense of the Legislature, that such authority was necessary to that end. Authority is also given, upon certain terms, to railroads by the section before referred to, to terminate their road at the point of intersection. This section, however, contemplates the substantial continuance of the road through another,

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and the same full accommodation of the public. The act is permissive, not prohibitory. The roads may terminate, not that they shall not terminate; thus evincing the sense of the Legislature that they could not otherwise change. These railroads are constructed for the public use. They are authorized to go over and occupy and own the land, of any citizen, against his will, thus exercising the right of eminent domain on the sole ground that such road is for the public use and benefit. In some cases, lands are donated to them to aid in their construction. If they are for the public use, it would seem rational that the public should have some rights in respect to them after their construction.

It is laid down as a general principle, that there is an implied obligation on the part of the grantees of all franchises to execute the conditions and duties prescribed in the grant; the grantee of the franchise of a ferry "is obliged to provide and maintain facilities for accommodating the public at all times with prompt and convenient passage," the public have an interest in such franchise. (3 *Kent*, 458, 459.)

The statute provides that every railroad "shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice;" and shall take, transport, and discharge such passengers and property on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved in an action for damages, for any neglect or refusal in the premises.

This provision seems to be plain and imperative. Railroads are common carriers in this State, and it is their duty to be ready and prepared, at all reasonable times, to transport freight and passengers.

Suppose a road, without necessity, ceases to run over a portion of its track for a week, or a month, would that be any answer to an action for not transporting freight tendered for transportation? I think not. Would it be any better answer for the road to say it had concluded not to carry freight over that portion of the road any more at all? If not, then this proceeding, to tear up its rails, and to abandon transporting of persons and property on its eastern portion, is a violation of its duty and of its charter.

Abandoning a portion of a road after large business interests

have grown up in connection therewith, to further other rival interests of roads or communities, must operate disastrously and oppressively; and if done without authority, there should be, and I think there is, a remedy in the courts to see that it is not done without imperious necessity.

If the obligation of the defendant be conceded, to continue the operation of its road, I do not understand the high power of the court to prevent the defendant, by injunction, from depriving itself of the power of fulfilling its chartered obligations, in that respect, to be seriously contested.

I think the power of the court is sustained both by principle and authority. I will refer to a single case in the Court of King's Bench, in England. (*Rex a. The Severn and Wye Railroad Co., 2 Barin & Ald., 646.*) The railroad company, in view of favoring a particular colliery, discontinued a branch of their road, and took up the iron thereon—the chief owners in the road having become interested in the favored colliery. The court, on application, unanimously granted a mandamus against the company, to compel them to relay and operate their road. *BEST, J.*, after alluding to speculators obtaining charters from Parliament under the idea of great public benefits, adds, “and where their sanction is obtained, is it to be permitted to those persons to say that they will do only that which is beneficial to themselves, and disregard entirely the interests of the public?”

It is urged here that the court should not interfere, because any one now has the right to make a road along the track proposed to be abandoned, under the general railroad act. The Legislature had the power to grant that right to any one prior to the passage of the general law, so that the principle is unchanged. Since the decision of the Supreme Court of the United States in the *Charles River Bridge Co. a. The Warren Bridge* (11 *Peters' U. S.*, 420), the power of the Legislature on this subject has been unquestioned. Again, it is insisted that the defendant cannot operate its whole road without loss, and without endangering its solvency. If that were so I should not interfere; no court would be justified in doing so; but I am not satisfied that such is the fact. There is great difference in the statements on this subject by the parties; and a decided impression is left upon my mind, that the motive for abandonment

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is not apprehension of loss to the owners so far as respects this road. The proposition to lease and run the whole road for twenty-one thousand dollars per annum, seems to have failed to command any attention from the defendant, though it would have paid a large interest upon the present owner's investment. It seems to me the public interest demands the running of this branch of the road. The owners thought so in October last, and so declared, in their articles of association organizing the road anew. It is said that a large portion of the rails will have to be removed in any event, even with the view of putting the road in order for operation. This I have no doubt is the fact, and the injunction should restrain the removal only of that portion not indispensably necessary to repair and refit the road for operation.

In this modified form, in my opinion, the injunction should be continued, and it is ordered accordingly.

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Supreme Court, Third District; General Term, December, 1859.

PRINCIPAL AND SURETY.

The surety is released, if the principals vary the contract without the surety's consent.

The shortening, by the principals, of the stipulated time of credit, discharges the the surety,—*So held*, where the creditor sued before the expiration of the time originally stipulated.

Appeal from judgment entered on the report of referee.

The plaintiffs (successors of Henderson, Kennedy & Kneeland, iron merchants, &c., Albany) instituted this action to recover of defendant, as surety (on contract made November 22, 1855), to pay not exceeding \$500, which should be unpaid on January 1, 1857, of goods sold his principals on a credit of six months; but which credit was, by consent of one of the principals, after

the sale, extended beyond the six months, on part of the goods, by accepting two notes, one of which was at seven months; and subsequently, the entire credit was, by the other principal, shortened on all the goods, to less than six months from the date of the first goods sold, by giving up both notes, and accepting a note payable one day after date. The referee reported the defendant was liable to \$259.88, and gave his "reasons" for his report, thus:

"The goods were sold on the time required by the contract, wherefore defendant became liable. He is still so, unless released by subsequent acts of plaintiffs.

"1. Subsequent extension of time of credit, releases the defendant.

"2. Subsequent shortening of time does not.

"3. Defendant is a surety."

Defendant appealed to the general term.

Le Grand Marvin, for the appellants.—Plaintiff's assignors (Henderson, Kennedy & Kneeland), varied the time of credit by shortening the same, and thereby discharged the surety, Marvin. The referee's conclusion, that the creditor and debtor's "subsequent shortening of times of credit" does not release the surety, is not consistent with equity or common sense, to say nothing of decisions. 1. The terms of a guaranty must be strictly complied with, or the surety will not be bound. If he proposes a credit, that particular credit must be given to the principal. It is not enough that the creditor waits until the time has expired before he calls for payments. He must agree to wait, so that he cannot sue in the mean time. (*Walrath a. Thompson*, 14 *Wend.*, 541, see cases there cited; *S. C. in Court of Appeals*, 6 *Hill*, 185.) 2. If a guaranty propose a certain credit, that particular credit must be given, or the surety will not be bound; a variance of three days will be fatal, as fatal as though it were for three months. (*Smith a. Dann*, 17 *Wend.*, 545, see cases there cited.) 3. The claim against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to show that the terms of the guaranty have been strictly complied with. (*Dobbins a. Bradley*, 17 *Wend.*, 425, and cases there cited.) 4. The surety is not to be held beyond the very precise stipulations of his contract. (*Yates a. McKee*, 3 *Kern.*, 237,

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and cases cited ; *Birkhead a. Brown*, 5 *Hill*, 541 ; *Parsons on Contr.*, 3 ed., 504 and 505, and cases cited ; 3 *Kent Com.*, 112, 222 ; *Burge on Suretyship*, 1847, 214, 215 ; *Story on Bills*, 441.)

Hamilton Harris, for the respondents.—I. The plaintiffs complied strictly with the terms of the guaranty as to the time of credit, and there remaining due on the 1st of January, 1857, after making all the credits, about the sum of \$800 for goods sold before December 31, 1856, the plaintiffs should have had a report for the amount for which the defendant had become surety, viz. : \$500, unless they had done some act to the injury of the defendant.

II. The taking of the two notes on the 25th of February, 1856, in no way affected the January sales, amounting to \$204.45 or \$55.43 of the December sales, except to accelerate the time of payment a few days. The surety's remedies against the principal were neither lost, diminished, or affected. Therefore, the the report of the referee, that the defendant was liable for those two sums, should be sustained. 1. Although a valid agreement between the creditor and principal to extend the time of performance, discharges the surety ; for the reason that the creditor has put it out of the power of the surety to avail himself of his right to enforce immediate payment from the principal ; yet an agreement between the creditor and principal, whereby the remedies of the surety are not diminished or affected, and still less, if they are accelerated, leaves the surety still liable, as he can sustain no prejudice. (*Fulton a. Matthews*, 15 *Johns.*, 433 ; *Bangs a. Strong*, 7 *Hill*, 250 ; *Burge on Suretyship*, 205, 208 ; *Hume a. Coles*, 2 *Sim.* (2 *Eng.*) *Ch. R.*, 12 ; *Schroeppell a. Shaw*, 3 *Comst.*, 446 ; *Stevenson a. Roche*, 17 *Eng. Com. Law*, 477 ; *Jay a. Warren*, 11 *Id.*, 450.) 2. The cases relied upon by the appellant, are those where the condition of the guaranty has never been complied with, viz. : the exact credit has not been in the first instance given, and, therefore, the proposition tending to a guaranty has never been accepted.

III. The returning and cancelling, on the 15th of May, of the two notes, and taking of the new note for the amount of the two payable one day after date, deprived the transaction of

February, in the taking of the two notes, of any force and effect. And the new note falling due before the time of credit of any of the sales had expired, thereby accelerating instead of diminishing the remedies of the surety, the referee should have reported due the plaintiffs the full amount for which the defendant became liable to pay under his guaranty. The cancelling of the two notes before due, and before any sale had become due, rendered their taking harmless. The surety could in no wise be injured by them. And the taking of the note in May, in their place, was directly for his benefit, as thereby the plaintiffs were enabled to procure judgment, and obtain a lien upon the principal's property at once.

IV. The taking of the note for the account, the same remaining in the hands of plaintiffs, and the recovery of judgment thereon, did not discharge defendant from liability to pay for the merchandise for which the note was given. These measures were an advantage, and could not be an injury to the defendant. (*Curtis v. Hubbard*, 9 *Met.*, 322; *Norton v. Eastman*, 4 *Green*, 450.) The amount unpaid when the note was taken, and suit commenced, in May, was near \$1,000. The defendant could only be made liable for \$500. The plaintiffs had a right to proceed at once to secure the balance of the debt, and could not split the demand. And even if the demand could have been split, yet it was the right of the plaintiffs to proceed to collect the whole, as the defendant would, if a part only had been enforced, have been entitled to have the amount collected apportioned.

BY THE COURT.*—GOULD, J.—In this appeal from a judgment entered on the report of a referee, I do not perceive that there is any controversy about the facts. The defendant agreed to guarantee to plaintiffs and their assignees, the amount of their claims against a third party for goods, that prior to January 1, 1857, they might sell to such third party, on a credit of six months. The guaranty not to cover a sum greater than \$500. Certain goods were sold, on the credit agreed, enough to bring the defendant's liability up to his guaranty of \$500. But (as the referee finds, and there is no dispute) after the original sales of these

* Present, W. B. WRIGHT, GOULD, and HOGEBOM, JJ.

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goods, and their delivery, the plaintiffs extended the term of credit on a part, and shortened the term of credit on a part, by taking the third party's promissory notes therefor, having different periods of time to run. The referee found, as matter of law, that as to those goods for which the credit was extended, the surety was not liable, and did not include the amount of those in his report, and from that part of his decision there is no appeal. He, however, found that shortening the term of credit did not discharge the surety; and for the value of the goods, the credit for which had been shortened, he found for the plaintiffs; and the defendant appeals from that part of his report, and from the judgment entered thereon. And the single point submitted to us, is, the correctness or incorrectness of that conclusion of law on the part of the referee. It being true, as it is conceded, that an original sale, on any term of credit, other than one of six months, whether it varied from that term two days or two months, would not bind the surety. (6 *Hill*, 540; 2 *Comst.*, 185.) I must confess, I do not see how it alters the law of the case, that the abridging of the term of credit was made after the sale. The main point, the actual shortening of the credit, was accomplished; and its effect on the term of credit was just the same as if the original credit had been given for the shorter period. The real credit was not for six months. In 6 *Hill*, 542, the phrase is, "he must agree to wait, so that he cannot sue in the mean time." And can he not "sue in the mean time," where having first agreed to wait the full term, he and his principal debtor afterwards (and before the expiring of that term) agreed that the term may be so shortened, that he can "sue in the mean time." The second agreement, as to credit, abrogates the first; and, thenceforth, the credit is for the newly-agreed term, and on that, there can be no pretence that the surety is held.

In the case before us, not only could the creditor sue within the original time of the credit, but he actually did so. And it would seem a little difficult, after that, to hold the party who was surety for a credit of six months, and for no longer or shorter term. To hold any other rule, were to place the surety entirely at the mercy of the creditor, and a principal, who saw fit to help the creditor rather than his surety, if not at the mercy of the creditors alone; since the latter, by a variety of inducements

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(as to other sales), might overbear the wishes and intentions of the principal; and since, if the term of credit could be shortened at all, without releasing the surety, it would be immaterial how much it was shortened, or when the shortening process was effected. A party might one day sell on the stipulated credit of months, and the next day abridge the term to days. In short, there is no safety in attempting to vary the rule from its strictness. We must insist that, if a surety is to be held upon his contract, that contract (whatever may be done with any collateral matters, and many such are noted in the books) must remain unchanged, unless by his consent, and he must be held according to the tenor of that contract, or not at all.

The judgment should be reversed, and a new trial had.*

KAHN'S CASE.

New York Superior Court; Special Term, September, 1860.

FAILURE TO PAY TAX.—CONTEMPT.—HABEAS CORPUS.

A person assessed or taxed, by reason of his personal property, may be committed as for a contempt, on account of his neglect to pay the tax.

The New York Common Pleas have authority to commit for such neglect.

What is a sufficient commitment in such case.

Habeas corpus to inquire into the cause of detention of Israel Kahn.

The facts are stated in the opinion.

Townsend & Levinger, for the prisoner.

Henry Morrison, for the receiver of taxes.

* On the new trial, plaintiffs stipulated to a judgment of discontinuance.

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BOSWORTH, J.—Israel Kahn has been brought before me on a habeas corpus; and the sheriff of New York, in whose custody he is, returns that he detains him by virtue of a writ or process of commitment, issued by the New York Common Pleas, which he produces, and a copy of which is made part of his return. It is insisted that this writ is void on its face. The writ is in the name of the People of the State; it is tested in the name of the first judge of the court, is sealed with the seal, and purports to be issued by order of the court, and is signed by its clerk.

The writ recites that the Court of Common Pleas, on the 21st of September, 1860, in the matter of the application of James Kelly, receiver of taxes in the city of New York, as applicant, and Israel Khan, as respondent, "to enforce payment of the personal tax assessed and confirmed against" the said Israel Kahn, for the year 1859, "by reason of the matter alleged in the application of the said James Kelly, receiver, as aforesaid, duly verified, as well as by reason of the failure of the said Israel Kahn to show the court satisfactory and sufficient reason as defence or excuse of the matters alleged in said application," adjudged (said Kahn) guilty of the misconduct in said application, alleged, to wit: "the neglect by him, said respondent, to pay the personal tax assessed, imposed, and confirmed against him for the year 1859;" that this misconduct prejudiced, &c., the rights of said applicant; that Kahn stand committed to jail upon said misconduct, there to remain until he paid said tax, being \$98.41, and the costs and expenses of said proceeding, being \$26.30, in all, \$124.71, and that the warrant issue for that purpose. The writ then requires the sheriff to arrest and detain Kahn in jail, until he pays the \$124.71, and the sheriff's fees on such writ, or until the said Court of Common Pleas makes an order to the contrary.

The Revised Statutes (2 *Rev. Stat.*, 567, § 56 [§ 41]), declares that it shall be the duty of the court or officer, before whom a party shall be brought on habeas corpus, forthwith to remand such party, if it shall appear that he is detained in custody (among other enumerated causes) "for any contempt specially and plainly charged in the commitment, by some court, officer, or body having authority to commit for the contempt so charged, and that the time during which such party may be legally detained, has not expired."

The questions, therefore, are, *first*, can a person assessed or taxed by reason of his personal property, be committed as for a contempt, on account of his neglect to pay such tax; and, *second*, is such a contempt specially and plainly charged in the commitment in question; and, *third*, has the said Court of Common Pleas authority to commit for such a contempt.

The act of April 12, 1842 (ch. 318), declares that "the neglect or refusal to pay such a tax according to law, shall be held and deemed to be a neglect or violation of duty, or misconduct, within the provisions of title 13, of chapter 8, of part 3, of the Revised Statutes."

That title declares, that "every court of record shall have power to punish, by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in a cause or matter depending in such court may be defeated, impaired, impeded, or prejudiced" in the cases enumerated in that title.

The act of 1842 (*supra*), therefore, makes the neglect to pay a personal tax, a misconduct or violation of duty, which may in some cases be punished by fine and imprisonment, or either.

The act of April 18, 1843 (ch. 23), entitled "An act for the collection of taxes in the city of New York," provides (320, § 12) that "in case of the refusal or neglect of any person to pay any tax imposed on him for personal property," the receiver of taxes in the city of New York, when such a state of facts exists, as that section specifies, may "make application, within one year, to the Court of Common Pleas of the county, or to the Supreme Court, to enforce payment of such tax." Section 13, of the same act, declares that "the court may impose a fine for the misconduct * * * sufficient in amount for the payment of the tax assessed, and of the costs and expenses of the proceedings authorized by this act to enforce such payment, or punish such misconduct," &c., &c.

It follows, that a person residing in the city of New York, and taxed upon his personal property, may be punished as for a contempt, on account of his neglect to pay it. Whether, in this case, the decision was right or wrong upon the merits, I cannot inquire. If the commitment specially and plainly charges a contempt for misconduct of this character, and shows that the Court of Common Pleas of this county has adjudged

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that the said Kahn be committed for it, the statute makes the remanding of Kahn an imperative duty.

The commitment specifies and declares that the Court of Common Pleas has "adjudged" that said Israel Kahn is "guilty of the misconduct" therein specified, to wit: "the neglect by him, said" (Kahn), "to pay the personal tax assessed, imposed, and confirmed against him for the year 1859," and that he "stand committed to the jail of the city and county of New York, there to remain charged upon the said misconduct until he shall have paid" said tax, being \$98.41, and the costs and expenses of the proceedings, being \$26.30, and that a warrant issue for that purpose.

Whatever of informality there may be in the language of the commitment, it is specially and plainly charged in the commitment, that the Common Pleas has adjudged him guilty of the misconduct defined by the statutes of 1842 and 1843, and has also adjudged that he be imprisoned until he pay two specified sums, and that a warrant issue to carry such adjudication into effect.

The Court of Common Pleas must, therefore, be regarded as having disposed of every question affecting the merits of the proceeding, as it has made a final determination that the neglect of Kahn to pay his personal tax, was a misconduct within the meaning of these statutes, and was unexcused.

To this view, there is no answer, except such as is found in the argument, that the act of 1842 is, as to the county of New York, repealed by the act of 1843.

Section 1, of article 4, of the act of 1843, 328, declares certain provisions of the Revised Statutes inapplicable to the city and county of New York; and section 2, 328, repeals all acts inconsistent with the act of 1843.

The act of April 12, 1842 (ch. 318), is no part of the Revised Statutes, and no part of it is inconsistent with the act of 1843 (ch. 230), except that by the act of 1842, the application to the court to enforce payment of a personal tax is to be made by an "assessor," whereas, by the act of 1843, it is to be made in the city of New York, by the receiver of taxes.

The part of section 2, of the act of 1842, above-quoted, is general, and applies to the whole State; and if not inconsistent with the act of 1843, is not repealed by it.

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Instead of being necessarily inconsistent with the act of 1843, the existence of its provisions seems to be essential to clear authority in the Common Pleas, to commit a party to jail for such misconduct as is charged in this case. For it must be observed, that sections 12 and 13 of the act of 1843, 320, do not, in terms, confer any power to punish, nor prescribe how the fine that may be imposed, is to be collected.

I deem it quite clear, therefore, that no court or officer who is forbidden by law to review the accuracy of the decision of the Common Pleas, on a proceeding by habeas corpus, can discharge Mr. Kahn from custody. Sitting as an officer, having only such powers as were formerly exercised by a Supreme Court commissioner, the statute is imperative that I must remand the prisoner to the custody of the sheriff, as it appears by the return of that officer, that he detains him in custody by virtue of a writ of commitment from the Court of Common Pleas of this city and county, for a contempt (within the meaning of the word contempt, as used in the statute), specially and plainly charged, by a court having authority to commit for the contempt so charged.

A contempt within the meaning of that word, as used in this statute, embraces all kinds of misconduct which, under title 13, of ch. 8, part 3, of the Revised Statutes, may be punished by fine and imprisonment.

Section 2 of the act of 1842, declares that the neglect or refusal to pay a personal tax, according to law, shall be held and deemed to be misconduct within the meaning of said title 13, and that such misconduct may be punished in the same manner, and with like authority, as provided in that title.

The petitioner must, therefore, be remanded to the custody of the sheriff.

DUNHAM v. SHERMAN.

New York Superior Court; Special Term, October, 1860.

COSTS.—COMMISSION TO TAKE DEPOSITION.

In taxing costs in a cause, the prevailing party is entitled to include his disbursements for fees of the commissioner, by whom testimony was taken under a commission.

He is not entitled to include witness-fees, other than according to the rate prescribed by our statute, except on showing that the fees of witnesses in the country where the commission was taken, were regulated by law, and attendance could not be compelled without payment accordingly.

He is not entitled to include the charges of a solicitor employed abroad.

Appeal from the clerk's taxation of costs.

In this cause a commission to take testimony in England had been obtained by plaintiff, and executed in the course of the proceedings. The plaintiff's notice of taxation of costs, included as one item, commission-fees, \$192.12, and his affidavit to disbursements, was merely in the ordinary form, that the foregoing disbursements have been, or may be necessarily made or incurred, in the action. The clerk allowed this against the objection of the defendant, who thereupon appealed to the court.

Benjamin Vaughan Abbott, for the defendant.—The clerk shall insert * * * the reasonable compensation of commissioner in taking depositions. * * * (*Code*, § 311.) The case of *Finch v. Calvert* (13 *How. Pr.*, 13), which may be cited by the plaintiff, is no authority, as to solicitors' fees, the decision having been made before the amendment of the Code, in 1857. In all cases the power conferred on a commissioner to take testimony is strictly personal, and he cannot delegate his authority. (1 *Har. & Gill.*, 154.) It is submitted that under section 311 above, it must affirmatively appear that the compensation is reasonable. If, not, it should be disallowed

(*Shultz v. Whitney*, 9 *Abbotts' Pr.*, 71), and especially when it is manifestly unreasonable. Judgment is given for \$757. The costs, as taxed, are exclusive of disbursements, \$82, with an allowance of \$37.50, amounting to \$119.50. This the Legislature have given to plaintiffs as a reasonable equivalent to their counsel's charges for the whole litigation. The commissioner gets more for his labor than the plaintiff's attorney. The referee's bill is \$107.50, at the rate of \$5 the session (the law authorizing no more than \$3, except by consent), for services running through nearly a year. It is no exaggeration to say he has performed ten times the labor of the commissioner, whose duties were little more than those of an amanuensis. Any thing besides, and a reasonable per diem compensation to the commissioner, is believed not to be taxable against the defendant. The witness-fees before commissioner cannot be allowed on the ordinary affidavit, and any such items on the part of plaintiff have never been offered to taxing officer. (See *Case v. Price*, 9 *Abbotts' Pr.*, 111.) "The affidavit showing the disbursement, should also show the reasonableness of the charge, and that it is fair, just," &c.

Robert D. Benedict, for the plaintiff.

HOFFMAN, J.—The plaintiff sued out a commission to London, in which the defendant joined, so far as to exhibit cross-interrogatories. The commission was executed by a single commissioner, and it appears that the examination took place on the 8th and 9th days of December. His charge for executing it was £10 10s.

To this was added a bill of £28 18s. 8d., paid solicitor's bill, including payment to witnesses, making together £39 8s. 8d., or \$192.12, which has been allowed by the clerk. The bill of the solicitor is in detail, and contains, for payment to seven witnesses (one from Scotland, £8), the sum of £17 9s. The fees are £1 1s. to three witnesses; £2 2s. to three witnesses, and the £8 to one. The remainder is for the services of the solicitor employed by the plaintiff to superintend the execution of the commission. It is made up of items for attendances on the commissioner, and on the witnesses, with sums paid for copies of the interrogatories and cross-interrogatories which some of

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the witnesses requested might be left with them for examination to refresh their recollection.

I. The commissioner's fees are expressly allowed by the amendment of section 311 of the Code made in 1857. Justice Clerke has considered them proper, even before such amendment. (*Calvert v. Finch*, 13 *How. Pr.*, 13.)

II. The proper fees for the attendance of witnesses is also a necessary disbursement. I agree with Justice Smith in his views upon this point. (*Case v. Price*, 9 *Abbotts' Pr.*, 111.)

But a difficulty exists as to the measure of such allowance. I am prepared to say, that the attendance-fee allowed in our fee-bill (fifty cents), is proper to be taxed as to witnesses examined under a commission, and also the travelling-fees when the distance is over three miles, as therein prescribed; on this basis, the charge of the witness from Scotland, and of any other of the witnesses, might be allowed, had the affidavit been sufficient. (*Wheeler v. Lozee*, 12 *How. Pr.*, 448, and cases.)

A witness travelling from another State, to be examined here, is entitled to his travelling-fees from the boundary line within the State, to the place of trial, the distance to be estimated by the nearest usual travelled route. (*Wheeler v. Lozee*, 12 *How. Pr.*, 448.)

I am inclined to think that if the fees of witnesses are regulated by the law of the country in which a commission is executed, and the attendance cannot be procured without payment of such fees, that should form the rule of allowance here. The case is not so before me as that I can pass upon the question.

III. There can be no ground for allowing the charges of the solicitor employed abroad. Had the attorney on record been present, he could have got nothing specially for the services. An allowance has been made in this case. Expenditures of this description must be borne by the party himself, as he bears counsel-fees.

The taxation must be readjusted, by allowing the commissioner's fees, £10 10s., disallowing the solicitor's charges for services, £11 9s. 8d., and also the £17 9s. for witnesses, but with liberty to the plaintiff to have the fees of witnesses adjusted upon the basis of the fee-bill of our State, as before pointed out.

Order for retaxation.

HOWARD a. RAYMOND.

New York Superior Court; Special Term, October, 1860.

PLEADING.—ANSWER.

In an answer to a complaint for libel, matter which is alleged in justification may also be properly alleged in mitigation of damages.

Demurrer to complaint.

This was a suit against the proprietor of the New York Times for a libel; consisting in an article containing certain statements relative to the plaintiff's conduct in matters in which he had been employed as a lawyer. The case came up before Justice Hoffman, in the Superior Court, on demurrer by plaintiff to the defendant's answer.

The answer, among other things, set up that the article complained of was true; specifying particulars, pleading the truth in justification. It also contained a count that defendant would set up the same things in mitigation of damages in the following form.

And in mitigation of any damages to which the plaintiff might otherwise appear entitled by reason of the publication of said supposed libellous article, this defendant says—

I. That he repeats and renews all and singular, the matters stated under the second defence herein; and will give evidence thereof in mitigation of damages, as well as in justification.

II. That all the matters and things stated under the second defence were, on the 28th of May, 1860, currently reported and believed in the cities of New York and Brooklyn, and were published in a certain newspaper, called The Brooklyn Daily Times, published in said city of Brooklyn, and were so communicated to this defendant, and published by him as matters of current public news, he verily believing the same to be true.

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Plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defence.

H. P. Herdman, for the plaintiff, conceded that the matters pleaded would be good in mitigation of damages, but contended that they did not amount to a justification. The rule was, the justification must be as broad as the charge. There was nothing alleged against the plaintiff in the answer, which an honorable and high-minded man might not commit. Considered as grounds for mitigating damages, the matter pleaded might as well be shown before a sheriff's jury.

Benjamin Vaughan Abbott, for the defendant, argued that if the matter pleaded were admissible in mitigation, the answer must be sustained. The construction now placed upon the section of the Code, which permits defendant in libel to set up both justification and mitigating circumstances, allows him to plead the latter alone. The earlier decisions had been the other way; but the Court of Appeals has overruled them. (11 *N. Y. (1 Kern.)*, 357.) He contended also that the justification set up was sufficient as a bar.

HOFFMAN, J.—I think the answer in the present case is within section 165 of the Code, as interpreted by the case of *Bush a. Prosser* (1 *Kern.*, 357). There are allegations which, fairly construed, amount to a justification of the libel, and there are circumstances stated avowedly in mitigation of damages.

I think (but I believe the point is new), that it is immaterial that the matters stated in mitigation, are the same as those presented in justification. In other words, these facts are set forth as an absolute defence to any claim, and if insufficient for that purpose, as a partial defence, by operating to reduce plaintiff's recovery. In my opinion, this is the construction of the pleading, and this is warranted by the Code.

Demurrer to the answer overruled, with costs.

BURNETT *a.* PHALON.

New York Superior Court; General Term, October, 1860.

WITNESS.—EXAMINATION OF PARTY.

The rule that if a witness, with the fault of the party producing him, fail to answer, his testimony is to be stricken out, is applicable to the case of a party testifying in his own behalf.

In an action to restrain the infringement of a trade-mark, one of the plaintiffs, when offered as a witness on their own behalf, as to the issue on the question of damages sustained by them by the infringement, refused to answer as to the materials with which his compound, which he sought to protect by the trade-mark, was prepared.

Held, that his claim for damages was properly stricken out as a penalty for contempt in refusing to answer, he not offering other testimony in support of it. The proper practice on objecting to such interrogatories.

Appeal from an order allowing exceptions to a referee's report, and referring the case back to him.

The action was for an alleged invasion of the plaintiffs' right to the use of the word "Cocaine," with certain devices, constituting a trade-mark.

An order for judgment was entered in the plaintiffs' favor, enjoining the defendants from further infringing the trade-mark; and directing a reference to take and state an account of the profits made and obtained by the defendants upon, or by means of, the article in the order referred to, and sold by them under the name of Cocaine; and to ascertain and report the amount of damages sustained by the plaintiffs by reason of the depreciation of the sale of their article of Cocaine, resulting from, and in consequence of, the infringement of the trade-mark of the plaintiffs in the order adjudged, and all other damages which they might have sustained, and ought to be paid by the defendants, by reason, and in consequence, of such infringement of their trade-mark.

One of the plaintiffs was called as a witness before the referee on their own behalf. After stating the amount of sales, he was

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asked what profits had been realized on the article sold ; and answered \$1.40 on each dozen. On cross-examination, he was asked how he got at the profits per dozen, and replied, by estimating the cost of the materials, labor, &c. He was asked how he arrived at the cost, and to state particulars. The answer was, by estimating the cost of such material in bulk, finding what number of bottles contain a given quantity of compound, adding labor, bottles, packages, cost of printing labels, and dividing the cost by the quantity produced.

The question was then asked—in making up your estimate of profits, as you have given, what materials do you calculate the cost upon ?

The witness, under the advice of counsel, declined to name the materials of which the article "Cocaine" is composed ; the witness stated that the composition of the article was secret, having a considerable pecuniary value to the plaintiffs' firm, and not known to the public.

The referee decided that the inquiry was pertinent to the matter presented by the plaintiffs, and should be answered. The witness declined to answer. The referee decided that the witness was in contempt for not answering the question ; and as a penalty, that the subject of inquiry, to wit, the damages which the plaintiffs claimed to have sustained, by reason of any loss of profits upon sales made by them, or which they might have made of the article manufactured by them, but for any of the alleged acts of the defendant, be stricken out.

The defendant's counsel still insisted on an answer to the question. It was decided not now to be pertinent, and the counsel excepted.

An exception was taken by the plaintiffs, on the ground that the referee erred in deciding that the plaintiffs, in estimating their profits upon the article Cocaine, were obliged to disclose the materials upon which the cost was calculated ; that the inquiry was pertinent, and should be answered.

The plaintiffs also excepted to the decision that the plaintiff was in contempt for not answering, and as a penalty that the claim of the plaintiffs for damages should be stricken out of the case.

The referee reported that the plaintiffs had failed to prove any injury beyond mere nominal damages, to have been sus-

tained by the plaintiffs by reason of any depreciation of the sale of their article of Cocaine, in consequence of any infringement of their trade-mark by the defendant. In effect, the report disposed of the whole case before the referee.

The exceptions taken by the plaintiffs were brought before the court at special term, where both were allowed and sustained, and the report was set aside, and the case referred back to the referee to proceed under the order.

From this order the defendants appealed.

E. W. Dodge, for the appellant.

John Sherwood, for the respondent.

BY THE COURT.—HOFFMAN, J.—The Code has in all its provisions as to the examination of a party on his own behalf, treated it as an examination of a witness. It is now, as amended in 1860, as follows: "A party to an action, &c., may be examined as a witness on his own behalf, or in behalf of any other party, in the same manner, and subject to the same rules of examination, as any other witness, except," &c.

It is stated in the books of practice, that if a witness refuses to be cross-examined, his deposition shall be suppressed. The Clerk's Tutor in Chancery (9) refers to a case, October, 1633, as deciding this. (*Hurd's Pr.*, 346, n.; *The Practical Register*; *Civis Cancellariæ*, 322.)

Three cases are cited in Hoffman's Ch. Pr. (vol. 1, 463, n.), in which it was declared to be the duty of the examining party to have the witness produced for cross-examination; and if he fail to do this, the deposition may be suppressed. But the case of *Courtney v. Hoskins* (2 *Russ.*, 253) is also cited, and the head note is explicit, that if the witness refuse to be cross-examined, it is not reason for suppressing the deposition, as he may be compelled to submit to it.

The witness had attended and was examined, and no cross-interrogatories had then been filed. On a subsequent day, the party seeking to cross-examine, had a subpoena served upon him, which he disobeyed.

Whittick v. Lysaght (1 *S. & St.*, 446) is an example of a case in which the fault of the party, in not producing the wit-

ness to be cross-examined within the time fixed by the rule of court, led to the suppression of the deposition.

Raymond *a.* Perrin (10 *Sim.*, 179) is a case in which the neglect of the party moving to suppress, to take a course prescribed by the practice of giving a notice of an intention to cross-examine, was an answer to his application.

In *Flouriday a. Collett* (*Dick.*, 288), one Delaport had been examined as a witness on the part of the plaintiff; before he was cross-examined, he secreted himself. The plaintiff was ordered to procure him to attend and be cross-examined in a fortnight, or in default, that his deposition be suppressed. A case of *Cason a. Granger* is cited to the same effect.

And in *Beatagh a. Beatagh* (1 *Hogan*, 98) it was laid down, that whenever a witness would not come forward to be cross-examined, the proper course is to move that he be produced to be cross-examined, or that the deposition already taken be suppressed.

Spalding *a.* Brougham, in the Exchequer (2 *Ford. Ex. Pr.*, 158), and *Charlton a. Robson* (*Ib.*), are to the point, that the producing party must have the witness brought up to be cross-examined (it is to be assumed within a reasonable time), or the deposition taken by him in chief shall be suppressed.

All the authorities concur, that if the producing party is in any way in fault—if he fails in pursuing the regular practice as to retaining or producing the witness—the examination taken on his behalf shall not stand.

And it may be, that if, without his fault, but solely from the fault of the witness, the cross-examination had not taken place, the same will be the result. In the old case from the Clerk's Tutor in Chancery, it was said: "If a witness refuse to be cross-examined, it is cause of exception to his testimony, and the court will suppress his deposition, for it argues favor and partiality."

And Lord Ellenborough, in *Casenove a. Vaughan* (1 *M. & Sel. R.*, 6), says: "It is agreeable to common sense that what is imperfect—and if I may say so, but half an examination—shall not be used in the same way as if it were complete."

These authorities afford a clear guide and rule, to a certain extent, upon the present question. If the party is examined as a witness, his refusal to answer a cross-question is his own

act. It must entail upon him the loss of his testimony in his own favor, or may subject him to the usual compulsory process to compel a witness to testify if his adversary require it.

But there are still two questions to be settled. Was the interrogatory put to him pertinent to the issue? and if so, was he privileged from answering it?

It was pertinent. The plaintiff sought to establish his claim by proving his loss of profits. To make this out, he made an estimate of the cost of the materials used for a dozen bottles, and the price obtained for the same. The difference was profit. If he specified a given article to have cost a particular sum, and it was proven to have cost far more, the profit would be so much reduced. Hence, the inquiry as to the articles was pertinent.

Was he privileged from answering the particular question?

The learned judge holds that he was not bound to reveal the secret of his trade. On what ground is this exception placed?

I have looked in vain for any direct authority to the point. Can the principle of the exemption, if it exist, be any other than subjection of the witness to a pecuniary loss?

The English statute of 4 Geo. III., c. 37, was passed after the discussion in the case of Lord Melville. Eight judges had held against four that a witness was bound to answer, though by so doing he might subject himself to a civil action, or charge himself with a debt.

Our own statute (2 *Rev. Stat.*, 406-41) declares that any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit.

Mauran v. Lamb (7 *Cow.*, 176) was a case after the English act, and before our own. The party in interest, the plaintiff's *cestui que trust* was not compelled to testify against his interest.

So in *Cook v. Spaulding* (1 *Hill*, 580), after our statute, it was held, that the distinction between calling a party in interest, and a witness whose answer might subject him to a civil suit, was cited upon, and applied to a member of a banking association who refused to be sworn against them.

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But the Code adopts the principle of a bill of discovery, and allows a party to be examined against his interest, as well as to be examined on his own behalf.

In *Bull a. Lovelace* (10 *Pick.*, 9), it was ruled that a witness was not exempted from answering, although the answer may affect his pecuniary interest.

I conclude that the witness had not the privilege he claimed—that the referee was right in his decision upon that point; and that the exception taken to his decision, and allowed by the judge, was not well taken. This was the eleventh exception.

But the referee was wrong in rejecting the claim absolutely, and preventing the plaintiff supporting it by testimony of another kind, after his own had been stricken out, if that was applied for.

It is to be noticed, that the ordinary practice in cases of this description, is not for the referee to proceed and close the case, where a witness has refused to answer a question. From the authorities cited in *Hoffman*, Master in Chancery (60, in 1 *Dan. Pr.*, 920, *et seq.*); and from the cases of *Taylor a. Wood* (2 *Edw. Ch.*, 94), *Fokers a. Meeker* (3 *Ib.*, 452), and *Mowatt a. Graham* (2 *Ib.*, 13), it is to be deduced that the usual course is for the witness to state his objections to answering a question or questions, usually termed demurring to the interrogatories. These were to be reduced to writing, and passed upon by the master if the case was before him. His certificate was presented to the court which was applied to for process of attachment to compel an answer.

It was once held that the demurrer should be set down regularly for argument. A practice prevailed in our Court of Chancery for the party seeking the disclosure objected to, to move for compulsory process, and the court then determined the point. The proceedings were only suspended as to the particular point. The examination of the same witness, or other witnesses to other matters might be had.

This practice was accurately pursued in the case of *Byass a. Smith*, heard on appeal at the general term of this court, October 13, 1860. A referee was appointed to ascertain and report the amount of damages sustained by the plaintiff by reason of the defendant's use of the plaintiff's trade-mark. The plaintiff called the defendant, and in the course of the examination, put

to him various questions which he refused to answer. The referee gave a certificate setting forth the questions, his decision upon them (that they were proper, and to be answered), and the refusal of the witness.

The ground of the objection was a tendency of his answers to subject the witness to a criminal prosecution for a misdemeanor, under chapter 123, section 3, of the laws of 1850.

An order to show cause why an attachment should not issue against him was then obtained. Mr. Justice Robertson heard the application, and denied it, and his order was affirmed on appeal.

The objections were stated in detail in an affidavit used upon the motion. The usual course appears to be for them to be set forth on the face of the exception, and thus make part of the master's certificate. (1 *Dan.*, 920; *Bowman v. Rodwell*, 1 *Mad.*, 266; *Strathmore v. Strathmore*, 11 *L. J., N. S. Ch.*, 215; *Davis v. Reed*, 5 *Sim.*, 443.)

In the present case, however, as no objection has been taken upon this point of practice, and the referee shut out all testimony as to damages from a loss of profit, which might properly have formed the subject of a general exception to a report, we think the case may be regularly passed upon.

Section 272 of the Code as amended in 1859, gives the same power to a referee to punish witnesses, as for a contempt for non-attendance, or refusal to be sworn or testify, as is possessed by the court. It is urged with much plausibility, at least, that this is confined to cases in which the referee tries the case, a reference of all the issues in the cause—where he is substituted for the court. The resort to the court in this case was certainly proper. Indeed, the power of the referee in any case can only be concurrent.

Whether the defendant could obtain compulsory process to obtain an answer, or the plaintiff has a right to abandon his own evidence in chief, are questions not now before us.

The conclusion is, that the order appealed from must be modified by reversing so much of it as allows the eleventh exception, and affirming it in all other particulars, no costs of the appeal to be allowed to either party.

BEEKMAN'S CASE.

Supreme Court, First District; Special Term, October, 1860.

ASSESSMENT.—MUNICIPAL ORDINANCE.—COURT.

An ordinance of a municipal corporation, passed by one board at one session, but not passed by the other until the next session, is not duly passed, and is void.

A subsequent amendment, duly passed, does not operate to give validity to the ordinance.

Such objection to an ordinance authorizing an assessment, is a "legal irregularity" within the act of 1858, allowing assessments in the city of New York to be set aside.

That act is not unconstitutional as conferring any new office or trust on the justices of the Supreme Court.

Application to set aside an assessment.

The grounds of the motion are fully stated in the opinion.

A. M. Burr, for the petitioner.

H. H. Anderson, for the corporation.

SUTHERLAND, J.—The assessment and proceedings complained of by the petitioner must be vacated; because the ordinance, purporting to authorize such assessment and proceedings, was passed by the Board of Assistants on the 8th of May, 1851, and by the Board of Aldermen on the 6th of February, 1852; that is, because it was not passed by both boards in the same year, but was passed by them in different years; so that, when passed by the Board of Aldermen on the 6th of February, 1852, the Board of Assistants, by whom it had been passed, had been retired from office, and had been succeeded by a new Board of Assistants.

It was expressly decided by the general term of this court, in *Wetmore v. Story* (22 *Barb.*, 414; S. C., 3 *Abbotts' Pr.*, 262), that an ordinance so passed was absolutely void, although in

form duly approved by the mayor, on the ground, as I understand the reported reasons for the decision, that the Legislature, in designating by the charter the power vested in the two boards, as the Common Council of the city, as the legislative power must be presumed to have intended, that the universally recognized principles of actual legislatures, or legislative bodies, should apply to, and control the so called legislative action of the Common Council of the city of New York; so that a resolution or ordinance passed by the Board of Assistants in one year, could not be taken up as unfinished business, and concurred in by the Board of Aldermen in another year, so as to make it a valid resolution or ordinance of the Common Council, without consulting the existing Board of Assistants; but that, like the unfinished business of other legislative bodies, it must be taken up *de novo*.

Whatever might be my own opinion of this question as an original question, it would not be proper, or in order, for me to set up my own opinion against this express decision of the general term; and I must therefore hold, in this case, that the ordinance purporting to authorize the assessment and proceedings of which the petitioner complains, although approved by the mayor on the 7th of February, 1852, was absolutely void, and did not in fact authorize such assessment and proceedings.

If absolutely void, the subsequent amendment of it in 1853, by striking out the names of the three assessors originally inserted, and inserting three others in their place, did not and could not confirm it so as to make it a valid ordinance. There is nothing to show that when that amendment was made, the Common Council had the remotest idea that the ordinance required any confirmation. The amendment was, in terms, confined to the insertion of the three new names in the place of those originally inserted.

This application is made under the act, entitled "An act in relation to frauds in assessments for local improvements in the city of New York," passed April 17, 1858.

It cannot be doubted, if the words "legal irregularity," as used in the first section of the act, mean any thing, that the irregularity in the passage of the ordinance authorizing the assessment and proceedings in question was, and is, a "legal irregularity" within the meaning of the act. The ordinance

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was, or purported to be, the very foundation or authority for the assessment and proceedings complained of. The irregularity of its passage must, under the decision in *Wetmore v. Story*, be held to be fatal to the assessment, and all proceedings under it.

But it is insisted on the part of the Corporation, that the said act of the Legislature under which the application is made, was passed in violation of article 6, section 8, of the Constitution of this State, which provides that justices of the Supreme Court shall not hold any other office or public trust; that the act undertakes to confer on the justices of this court a new or other office or public trust, which by the Constitution the Legislature were prohibited from doing, and the justices of this court are prohibited from accepting, or exercising; and, therefore, that I, as one of such justices, cannot entertain this proceeding, or make any order or adjudication in it.

It is very clear to me, that this act does not undertake to confer any new or other office or public trust on the justices of this court, within the meaning of the constitutional provision.

This court always had jurisdiction over the frauds and legal irregularities (so called by the statute) not only of individuals, but of corporations, municipal and private, within its jurisdiction; and could always furnish a remedy to a party who had suffered, or was about to suffer, by such fraud or irregularity, in an action brought by him for such remedy; and perhaps, in certain cases, and under certain circumstances, could, by *mandamus* or *certiorari*, give a remedy for fraud or irregularity in the proceedings of a municipal corporation.

I think the act of April 17, 1858, in question, assumes this old and conceded jurisdiction of this court over frauds and legal irregularities (so called). It does not undertake to confer any new jurisdiction, or a jurisdiction over a new or additional class of subjects on the court, or the justices thereof; but simply declares, that an old and conceded jurisdiction of the court may be exercised and enforced through its justices in a new and summary manner, as to a certain class of frauds and "legal irregularities" mentioned in the act. As the court can only act and exercise its jurisdiction through its justices, the act in form declares, that the justices of the court shall exercise the jurisdiction in the summary manner prescribed by the act.

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The act gives to the justices new and additional powers, and imposes upon them new and additional duties, but only as to the mode or manner of exercising an old and conceded jurisdiction, and which, as I have before said, I think the act itself assumes to belong to the court. The act, in fact, gives a new remedy for an old and conceded class of wrongs, and that is all it does, or undertakes to do.

If the act had extended the jurisdiction of the court, or in form the jurisdiction of its justices, to a class of municipal frauds and irregularities, for which at the time there was no legal or judicial remedy, I do not think it would at all have interfered with the constitutional provision referred to.

The Legislature is constantly conferring on this court, or in form on its justices, new powers, and imposing on them new duties. Of this, its justices may perhaps have some reason to complain, but I do not see how the Constitution can, if the duties are judicial duties.

The powers and duties of a public officer may be said, in a certain sense, to constitute the office; but adding one or several additional judicial duties to the office of a justice of the Supreme Court, whose powers and duties are already so multifarious and extensive, can no more confer on him any other office or public trust, than "one swallow can make a summer."

On this point my conclusion is, that it is competent for me, as a justice of this court, to entertain this proceeding, instituted by the petitioner under the act of 1858, and that I have jurisdiction under that act to grant the relief asked for by him.

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THE PEOPLE *on rel.* HARTT *a.* WHITE.*Supreme Court, First District; Special Term, 1860.*

MANDAMUS.—ELECTION.

To a mandamus requiring inspectors of election to return whether the relators did not receive the greatest number of votes, and whether they did not declare them duly elected, a return that they were not duly elected by the greatest number of votes is evasive, and should be quashed on motion.

A suit, by claimants to office, for an injunction to prevent adverse claimants from acting as officers, is no bar to a mandamus to obtain certificates of election. Of elections in religious corporations.

Motion to quash return.

The facts in this controversy fully appear in the report of a previous proceeding, 10 *Ante*, 321.

The allegations and precept of the mandamus were as follows:

“That in an election duly held on the 12th day of March, 1860, for three trustees to supply the places of three whose offices were about to expire, by the religious corporation existing under the law of this State, for the incorporation of religious societies, under the style of The Society of the Church of the Puritans; at which election, you, the said White and Smith, being members of the said society, and deacons of the said church, having been duly nominated therefor by a majority of the voters present, presided; the said relators ‘were by the greatest number of votes cast duly elected as said trustees, and that you did, then and there, declare that they were so elected, and that the said election was adjourned without any voter challenging or questioning the election of the said relators; and that you now refuse to give to the said relators the proper certificate of their election, provided for by the law aforesaid.

“‘We do, therefore, hereby command and enjoin you forthwith to make, execute, and deliver under your hands and seals,

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to the said relators, a certificate of their election as aforesaid, in due form of law, or show cause," &c.

The return against which this motion was made, was as follows:

1. We, the said defendants, do respectfully certify to this honorable court, and show that before the said alternative mandamus was sued out, to wit, on or about the 31st day of March, 1860, the said relators commenced their certain action in this court against these defendants and others, touching the same subject-matter in the said alternative mandamus set forth, and demanding, among other things, the same relief sought to be obtained by the said writ of mandamus, to which said action the defendants pleaded, and put in their answer (to which complaint and answer these defendants for greater certainty refer). And the said action was pending and at issue at the time the relators sued out the said alternative mandamus; and the same is still pending and undetermined, and was noticed by both parties for the last term of this court (June, 1860), but has not yet been reached.

2. And we further certify for cause why we do not and cannot give to the said relators a certificate of their election as trustees of the Society of the Church of the Puritans; that the said relators were not by the greatest number of legal votes cast at said election, duly elected as such trustees; and although one of these defendants may have then and there stated that the relators were elected, such statement was not made by them as their official act, but was only an informal remark of one of them as to the apparent result; these defendants then and now supposing that only by the certificate authorized by the statute could they declare who were elected; which certificate these defendants intended to, and did, make on a future day; the tender thereof being as is hereinafter stated.

These defendants further say, that whether the said election was adjourned without any voter challenging or questioning the election of said relators, the defendants, by reason of the confusion that prevailed during said election, and until the adjournment thereof, are unable to say. And these defendants further say, that upon their counting the votes after the same were deposited, and before the adjournment of the meeting,

these defendants did in fact state that each of the relators appeared to have thirty-three votes; and the said Harvey and Tompkins each thirty-one votes, and the said Bennett twenty-seven votes; but that *subsequently*, upon comparing the votes thus counted with the poll-list, it appeared by the latter, that but sixty-two persons had, in fact, deposited their votes; and the ballot of Edward G. Bartlett, a legal voter at said election, had been, by mere oversight, omitted, though duly delivered to these defendants at and during said election, to be counted; and his name was not upon said poll-list. That said last-mentioned ballot was for said Harvey, Tompkins, and Bennett; and that it was further discovered by these defendants, that of the votes cast for the relators, and counted for them in such statement of the result of said election, as was made by them as aforesaid certain votes; that is to say, the votes of L. H. Dinmore, Henry Shepard, William Herries, J. F. Whipple, E. Waterbury, Samuel Hutchings, William H. Woodbury, and Edward Gilbert, were, and each of them was, illegal; and the said last-named persons were, and each of them was not, a legal voter of said society; and that for the facts aforesaid, the relators not having received the greatest number of legal votes cast at said election, these defendants could not, and did not, make or give a certificate that the relators had received the greatest number of votes at said election, or that they were duly elected trustees of said society.

3. And these defendants further certify and show, that after said election, and before the suing out of said writ of alternative mandamus, they certified under their hands and seals, that Charles R. Harvey and Charles B. Tompkins were duly elected trustees at the said election; and that as to the third trustee there was no election, by reason of an equality of votes cast for James O. Bennett and the relators, which certificate was delivered to said Harvey and Tompkins, and was afterwards, and before the suing out of said writ of mandamus, duly presented to and accepted by the Board of Trustees of said society; and the said board thereupon, then, and there, by a resolution duly passed, recognized the said Harvey and Tompkins as trustees of said society, and members of said board, and caused notice thereof to be given to them; and the said Harvey and Tompkins accepted the said office, and at, and before the suing out of

said writ of mandamus, were, and now are, exercising the functions thereof, and performing the duties belonging thereto; and these defendants further certify and show, that the said Harvey and Tompkins were duly elected to said office by a majority of the legal votes cast at said election.

Edward Gilbert and *William Curtis Noyes*, for the motion. The return is defective in that—1. It does not state whether any declaration was made before the adjournment of the election, whether the relators were elected or not; only that such a declaration *may have been made*, without saying when. 2. It does not say whether or not there was any challenging or objection made to their election prior to the adjournment; it only evades by alleging a confusion “that prevailed during the election.” The inspectors could tell whether they knew or heard any such thing at the time. 3. It does not state when they subsequently compared the poll-list, and found an error, nor when they “further discovered” that any illegal votes were cast, as stated in the return. The return should state whether this was not long after the election had been adjourned, in order that we may know whether their acting at that time was not wholly without authority.

The result is, that the substantial allegation in the mandamus is left unanswered, and has been intentionally evaded.

The relators are therefore entitled, upon this motion, to the relief they seek, because the prior order, as the command of the mandamus, has not been complied with.

Besides, both returns show that the relators were duly elected, by having received the greatest number of votes given at the election. It is the votes that elect, not the declaration of the inspectors; and this has been decided by the court in the case. (10 *Abbotts' Pr.*, 324.)

The return, then, is intentionally evasive; and if the court deem it proper, as there can be no doubt of the relators' election given upon this return, evasive as it is, a peremptory mandamus may be granted.

E. W. Chester and *Wm. M. Evarts*, in support of the return.—
I. By rule 51 of this court, the mode of dealing with a return to a mandamus is pointed out. That mode is by plea or de-

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murrer. If any other mode exists, it is only in extreme cases, where the return is clearly frivolous. The cases in our own reports, where a motion to quash has been made in place of a demurrer, were before the existence of this rule. There can be no pretence that the return in this case is frivolous, calling upon the court for the exercise of an extraordinary power, instead of leaving the matter to be decided on an issue of law or of fact to be made up under the rule. (*Tapping's Mandamus*, 372; *Laro Lib.*, N. S., 60.) The People, &c. a. The New York Common Pleas, was decided before this rule existed, and is overruled by the rule. The decision, too, seems to have been as a matter of special favor to a judicial tribunal.

II. The return shows the pendency of another action for the same identical cause,—between the same parties, the relators and the defendants—the relators being the plaintiffs,—and this action in this very court, and at issue, and on the calendar for trial when this mandamus was sued out. It would be an anomaly if, while an action is thus brought and pending, the relators would be indulged in harassing the defendants with another suit. This point, in the hurried way that the matter was disposed of in the heat of the summer, failed to attract the attention of the court. Tapping, 23, quoting various authorities says, under the caption of *lis pendens*: “It is a principle of law, that where a matter is in controversy before a competent jurisdiction, the court will not interfere by a mandamus. Such a fact will, therefore, found a good return.” This principle applies with its full strength where the relators are the *plaintiffs* in the pending suit, and are proceeding with it, and that in the same court. In such a case, we cannot imagine an exception to the rule. It is a rule so well founded in common sense and common justice, and has been so long recognized and undisputed, that the defendants may well rest upon it as answer to this motion to quash, and for a peremptory mandamus.

III. A rule equally clear and equally well settled is, that this writ can only be granted *in the absence or want of a specific legal remedy*. The same author says, p. 18: “The writ of mandamus is not a writ grantable of right, but by prerogative, and among other things, it is, as before stated, the absence or want of specific legal remedy which gives the court *jurisdiction*

to dispense it. It is not granted to give an easier or more expeditious remedy; but only where there is no other remedy, being both legal and specific; and so long and uniformly has the court adhered to this doctrine, and refused to grant, or, if granted, quashed the writ, in cases where there is a specific legal remedy, either at common law or by act of Parliament, that it has become a principle of the law of this subject." A great multitude of cases are referred to by the author to support this doctrine. The writ of *quo warranto* is such a specific legal remedy. The same author, p. 26, under the heading *quo warranto*, says: "The court will refuse to grant the writ of mandamus if it appear that the applicant has a remedy by information in the nature of a *quo warranto*." Thus a rule for a mandamus to admit a recorder was refused, because it appeared there was a recorder *de facto*, and, therefore, that the applicant had such a remedy. The return shows that a certificate has been given to others,—that they have been admitted to the office, and are now exercising its functions. They are in office, and can be removed from it only by *quo warranto*. This is the specific remedy to which the relators are entitled, if duly elected. The right of the relators depends upon their election. The certificate is only evidence of this. Before a court will award them this evidence, they must show that they are entitled to the office; and when they show themselves entitled, the court should award them the office, and not the mere evidence that they are entitled to it. This specific remedy exists, and is by *quo warranto*. It is obvious that the relators, after bringing an action in this court, in which the merits will be tried upon the pleadings and evidence, seek here a mere technical advantage, in which they hope to succeed without going into the evidence, and without regard to the real merits of the matter, and the rights of the parties. They seek, too, by this proceeding, to obtain an advantage over those now in office, without making them parties, or giving them an opportunity to defend their rights; and by a proceeding, too, in which the corporate body is shut out from all means of ascertaining its rights and interests.

IV. The return shows that a certificate has already been given by the defendants, which has been recognized by the Board of Trustees, and the defendants admitted into their body.

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Whether the defendants erred in this or not, their powers are gone; they are *functi officio*, and what they have no power to do without the order of the court, they cannot do by virtue of any powers which the court can confer upon them. The court can only compel them to do what they have the power to do, and ought to do of their own motion.

V. The court will not grant a mandamus to compel men to do what will be of no effect when done. Others hold the certificate, and are exercising the functions of the office, and another certificate to others cannot have the effect of ousting them. They will not regard it as a *supersedeas*. And if it could have this effect, then surely it ought not to be granted, unless those whose rights are to be affected, are before the court as parties.

VI. The order requires the defendants to "make a further and sufficient return to the alternative mandamus," without any specification of what the defect is in the former return, or what is required as a sufficient return. In the notice of this motion we are referred to Mr. Gilbert's affidavit. How this can be a guide, it is difficult to imagine. But assuming that it is, every thing complained of in that affidavit is met by the amended return. The objections now made on the part of the relators, are—

1. That it does not state whether the declaration was made *before* the adjournment. Then the utmost that relators can claim is, that it was made before or after, as they may choose; that is, that it be taken most strongly against defendants. The return, in truth, admits the allegation as made by relators, and they have the benefit of it.
2. That the return does not state whether any objection was made to the election of the trustees prior to the adjournment. The return states that the defendants, by reason of the confusion prevailing, cannot tell whether there was or not. This is all they know about it. And yet it is urged as an objection to this, that "the inspectors could tell whether they knew or heard any such thing at the time." If they had heard any such thing at the time, then they could tell; but they say they cannot tell. This is surely a *hypercriticism* upon the form of an expression in the return, and it asks merely a change of form to better suit the taste of counsel, not a change of substance.
3. That "it does not state when they subsequently compared the poll-lists and found an error," and should state whether this was not *long after* the election. This

part of the return is not in answer to any specific allegation in the writ; and if there is, therefore, any thing wanting in certainty, it is not a cause for quashing the return. It is not an omission to answer any charge made; nor is there any hint in the order or in the affidavit, that any thing more certain or definite was required in this regard.

These three points, made by relators' counsel, fail to show that "the substantial allegation in the mandamus is left unanswered, and has been intentionally evaded." Counsel for relators say further: "Besides, both returns show that the relators were duly elected, by having received the greatest number of votes given at the election. It is the votes that elect, not the declaration of the inspectors; and this has been decided by the court in the case (*10 Abbotts' Pr.*, 324)." It is true that "it is the votes that elect, not the declaration of the inspectors;" and this is a full answer to the relators' claim to a mandamus in this case. The question—the real question—between these parties and others is, who is elected? And since this is to be determined by the votes, the court must be called upon in such a form of proceedings as will make this issue. For this, a writ of mandamus is not adapted; at least, not a writ of mandamus merely to compel the giving of a certificate. If a mandamus is to be used at all, it must be (taking this argument of plaintiffs' counsel to be correct) a mandamus to the Board of Trustees to admit the relators to seats in their body, on the ground that they are legally elected. This might produce an issue in which the facts could be ascertained. It would not be a mandamus, the object of which is to obtain a mere piece of evidence, not conclusive upon the counsel's own showing. Whatever of sound argument there may be in the decision cited in *10 Abbotts' Pr.*, 324, the relators have appealed from that decision, and keep both the suit in which it is made, and the motion still in court—the suit on the trial-calendar, the motion on the appeal-calendar.

VII. The high prerogative writ of mandamus is never used to give to parties a mere technical advantage; but only where otherwise wrong and substantial injustice would be suffered, for which the parties had no other remedy.

VIII. The result of the whole is this,—

1. That the *first* answer or defence of the return is not in-

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volved in the relators' present objections; and while that stands, no peremptory mandamus can be granted, should the court consider the second answer or defence of the return, to which the relators' present objections do refer, insufficient.

2. The first answer or defence of the return is a bar to the relief of mandamus, for two reasons. (1.) Upon the general principle, that the suit by these relators against these respondents, already pending, precludes this second litigation while the first is pending. (2.) Because a mandamus is never allowed as a remedy while *any* other exists, although such other may not have been instituted. These relators must admit that remedy by suit does exist, for they are prosecuting it.

3. The defence in the second answer of the return is good, for several reasons. (1.) It shows the posture of the contesting rights to be such, that *quo warranto* must be brought to settle them, and mandamus can adjudge nothing. This is a universal principle, and admits of no exception. When one party is in, the contesting party cannot get in by mandamus, as he may sometimes to an office without any claimant in possession. (2.) It shows that the respondents have in good faith given a certificate of election, and cannot in conscience give a contrary certificate while the *fact* of the *illegality of the votes necessary to make up the relators' number* remains unchanged in their minds. On *quo warranto* that *fact* will be examined. In this litigation it is not involved, and any adjudication cannot be made here that will instruct the respondents on that point. (3.) Because the whole of this answer or defence to the return is *true*,—is *sufficient* and *complete*,—and only by its being disproved, can the least duty be imagined on the part of these respondents to give any other certificate. That the answer is *true* is admitted by this motion.

4. If this answer or defence be not good at law, the only method of objection is by demurrer. If a motion may, for avoidance of dilatory forms, be allowed, yet, in substance, it is a demurrer, and the substantial rights of the parties will be sustained accordingly. "In this case, the relator, in effect, demurs to the return. If the defendants shall be dissatisfied with the decision which shall be made, a record may formally be made up, upon which such decision can be reviewed by a higher tribunal." (The People *a.* Hudson, 7 *Wend.*, 474.) In that case,

the motion covered the *whole* return. Here, there being a good return, not demurred to by this motion, there could be, at most, only judgment against respondents as to this branch, as if on demurrer, leaving the other defence of *lis pendens* to be tried, if contested in fact. If not contested in fact, then the judgment would be for the respondents on the *whole* merits, though the second answer or defence of the return was insufficient.

William Curtis Noyes, in reply.—I. The fact that the relators were elected by the greatest number of votes, and the defendants declared them so to be, and adjourned without challenge of the result, of itself entitles the relators to a certificate of election (10 *Abbotts' Pr.*, 325), and the return, in order to be sufficient, should have denied this fact. (10 *Wend.*, 25; 14 *Barb.*, 32; 11 *How. Pr.*, 89.)

II. The suit alluded to is no bar to the mandamus. It is for damages; the parties-plaintiff, or defendant, are not identical; the relief here sought as the only object, is there only incidental; and there, the injunction which was the main relief sought, was denied. Moreover, the effect of the mandamus cannot be had in this suit. The remedy by action is not specific, and does not take away that by mandamus. (1 *Barb.*, 34; 23 *Wend.*, 458.) The writ of *quo warranto* is no specific remedy here. The giving of the certificate sought, is a ministerial act, and *quo warranto* cannot be instituted without the certificate. The relators are entitled to the certificate to throw the burden of proof upon the adverse claimants.

INGRAHAM, J.—The plaintiffs move to quash the last return for insufficiency. That return sets up,—

1. That before the writ was issued, the relators commenced an action against these defendants and others, touching the same subject-matter in the mandamus set forth, and demanded the same relief sought to be obtained thereby, to which the defendants pleaded the same was at issue.

2. That the relators were not by the greatest number of legal votes duly elected trustees, &c.

3. That there were more ballots counted than there were persons who had voted, and that the inspectors had a ballot which

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was by oversight omitted, and that such ballot was for defendants, which was discovered after the ballots had been counted and the result announced. And, further, that the inspectors afterwards discovered that eight of the persons who voted for the relators were not legal voters, and therefore they gave the certificate to the defendants.

4. That they had given a certificate to the defendants, who have undertaken the duties of the office, and are now acting as such.

By the previous proceedings, it is evident that the defendants have not answered as required by the court.

They were required to answer whether, of the votes that were received by the inspectors at the election, the relators did not receive the greatest number, and whether they, the inspectors, did not declare the relators duly elected, &c.

They were also required to say whether any votes were challenged at the election. On these points, the respondents have not answered, but have evaded such an answer by setting up that the relators were not elected by legal votes, and that they do not know, owing to the confusion, whether any voters were challenged or not.

Without referring to the residue of the return, it appears to me that the conduct of the respondents in thus attempting to evade an answer to matters set up in the papers, has exposed them to the consequences of this motion.

It is of no moment whether they have set up other matters in their return, which may constitute a defence. The relators had a right to a return on the matters directed by the court; and where, in a second return, the respondents seek to evade making it consistent with the order of the court, they ask the court with a very ill grace to look at their other defences, to excuse them from not obeying the order of the court.

It was their duty to have answered explicitly on these matters, and having done so, they might then have set up any further defences which they supposed existed to this proceeding.

For these reasons, it would be enough for me here to grant this motion without examining the other defences set up by the respondents.

I think it, however, proper to add here, that the action set up

by the respondents as a bar, cannot be a bar to this proceeding; because in that action neither the certificate of election nor possession of the office can be obtained by the judgment. Whatever may be the prayer of the complaint, the facts set up warrant no recovery, unless it may be damages for withholding from the relators the certificate of election; and, under the present practice, the prayer of the complaint becomes immaterial. As to the residue of the return, I concur with Mr. Justice Mullen in the views heretofore expressed by him in this case.

After the ballots were received by the inspectors without challenge or objection, their right to inquire into the character of the voters ceased. The only duty that remained for them to perform was to count such ballots and return the number of votes received, and the names of those having the greatest number.

It would be idle to attempt to conduct any election by ballot, if, after the election was closed, the inspectors could, when they ascertained who had the greatest number of votes, institute an inquiry whether any of those who voted for the successful party were legal voters, and in this way change the result of the election.

If such a course could be declared legal, there would be few elections at the present day which might not be affected by such a proceeding. The mere statement of the proposition carries the answer on the face of it.

I think this motion must be granted. The conduct of the respondents in evading a proper return, renders it proper that a peremptory mandamus should issue. Nor is there any doubt about the propriety of such an order from what may be inferred from the return itself, viz., that they did count the votes received by them, and that the relators had the largest number. The subsequent proceedings to reduce that number were illegal, and if there were more votes in the box than had been received, it was too late for the inspectors to remedy the matter after the ballots were counted. The remedy was in a different proceeding.

Motion granted, with \$10 costs.

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KELSEY *a.* KING.*Supreme Court, Second District ; General Term, September, 1860.*BROOKLYN. — PRIVATE PROPERTY TAKEN FOR PUBLIC USE. —
INJUNCTION.

An owner of land assessed for a local improvement cannot invoke the equitable powers of the court to relieve against omissions or irregularities in the proceedings of the commissioners.

An individual taxpayer cannot, by suit, impeach the validity of a contract by the municipal corporation.

Under section 8 of the Brooklyn sewerage and drainage act of 1857 (2 *Laws of* 1857, 100, ch. 521), providing that if the commissioners, in their plan of sewerage, find it necessary to construct a sewer through any street not opened by law, and it cannot be constructed without carrying it through a part of such street, the commissioners may take proceedings to have the street opened ;—an absolute or physical necessity is not contemplated. The commissioners' plan is for the entire city, and the commissioners are to be allowed a large discretion.

The appropriation of land to public use as a street, confers a public right to use the same for the construction of a sewer in the middle of the street, and the owner is not entitled to additional compensation for the latter use.

The privileges incidental to the use of property taken for public use as a highway.

Appeal from order dissolving injunction.

The facts are fully declared in the opinion.

Britton and Ely, for plaintiff.

Alexander McCue, for the defendants.

BY THE COURT.*—BROWN, J.—The plaintiff is the owner in fee of lands in the city of Brooklyn, over and through which Butler-street, sometimes called Harrison-street, had heretofore been laid out, but not opened for use under the usual proceedings for that purpose. The defendants, Gamaliel King, John H. Funk, Daniel L. Northrop, and William B. Lewis, are the

* Present, LOTT, BROWN, EMOTT, and SCRUGHAM, JJ.

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commissioners of sewerage and drainage in the city of Brooklyn, under the act of the 15th April, 1857, and the act amending the same, concerning sewerage and drainage, in such city. The defendants, William Kenny and John R. Holliday, are contractors with the commissioners to open a sewer in Butler-street. The plaintiff filed his complaint in the City Court, and upon the grounds to which I shall refer, obtained an injunction restraining the defendants from proceeding to construct the sewer. The injunction was afterwards dissolved upon motion, with the condition, that should the plaintiff appeal within three days, and take short notice of argument, the order should not take effect until the decision of the general term of this court. The plaintiff appealed, and hence we are to determine whether the plaintiff is entitled to the injunction, which is the principal object of the action.

To enable the commissioners to construct the sewer, they instituted proceedings under section 8 of the act, and presented a petition to this court for the appointment of commissioners of estimate and assessment. They were appointed, and entered upon the execution of the duties of their office, made their report, which was duly confirmed at the special term of this court, the plaintiff being heard in opposition thereto.

One of the grounds upon which he now asks the injunction is, the neglect of the commissioners to comply with certain requisites of the statute in regard to opening streets; and, in particular, that the notice of the application for the appointment of commissioners of estimate and assessment, did not specify the district of assessment. It is an answer to this, as it is to all similar objections, that the plaintiff cannot invoke the equitable interpositions of the court for any omissions or irregularities in the proceedings to open the street. He may review them by certiorari, or he may put in issue the title of the public authorities of the city to enter upon his lands, by a common-law action, which will bring up the regularity of the proceedings to open the street; but he cannot test their effect upon his title by an equitable action.

Another ground upon which he claims the injunction is, an informality in the form, or rather in the parties to the contract with the defendants Kenny and Holliday to construct the sewer. The contract is made in the name of the city of Brooklyn. If

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a contract made in this form should be deemed illegal, the plaintiff is not in a condition to impeach it, or put its validity in question. He is but one of a multitude of the inhabitants and taxpayers of the city, and has no standing in court to litigate in regard to it.

He next asserts as a ground of his application, the want of all necessity for a sewer in Butler-street, and claims the existence of such necessity as a condition precedent to the application to open the street. The act is designed to furnish a system of drainage for the entire city, and requires the commissioners to devise and frame a scheme for the whole city, upon a regular and systematic plan, so as to remove the surplus waters, and the superabundant filth from every part of the city. The object is its purification, and the better health, happiness, and convenience of its inhabitants. Such a scheme, it is evident, must have reference to the formation of the ground, its level in various places, with a view to the descent of the waters to be removed, and the communication of the principal sewers with the tide-waters into which their contents are to be poured. Section 8 of the act declares, that "should the commissioners, in devising such a plan, find it necessary to construct a sewer through any street or avenue not opened by law, and such sewer cannot be constructed so as properly to drain any portion of the city, without carrying the same through such unopened street or avenue," it shall then be lawful for the commissioners to apply to the Supreme Court, and institute the usual proceedings to open the street. The argument of the plaintiff is, that the word necessary, as used in the section, and the words, "and such sewer or drain cannot be constructed so as to properly drain any portion of said city without carrying the same through such unopened street or avenue," indicate an intention that the unopened street should not be appropriated to the uses of the sewerage system, unless it was physically impossible to conduct the sewerage through the streets already opened to public use. And thus the absolute necessity would become the condition upon which the commissioners could apply to open a street. Such a construction is not reasonable, for it takes away much of the discretion of the commissioners in the location of the works, and limits and restrains their powers of action. So that a liberal, comprehensive, and efficient system of drainage cannot be ac-

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complished. No matter what impediments the commissioners may encounter ; no matter what may be the cost and the time required to remove them ; unless these impediments are of such a character that they cannot be removed, their powers are limited to the streets already opened to the public use. The words of the section, "in case the commissioners, in devising and framing a plan of sewerage and drainage, find it necessary" to construct a sewer through an unopened street, and the words, "properly drain any portion of said city," which follow almost immediately thereafter, show that the commissioners were to exercise their own discretion as to the sewers, and the location of them, which were to constitute an efficient system of sewerage for the city. The idea of devising and framing a system of sewerage for a large and growing city, which are the trusts confided to the commissioners, implies a large measure of discretion, for without it, they could not be beneficially exercised.

The counsel for the plaintiff also contends that the appropriation of the land to the uses of a public street, in conformity with the statutes and the constitution, conferred no right to appropriate it to the uses of constructing a sewer, devoted to conducting away the impurities and surplus waters collected from portions of the city, without compensation to the owner. This presents the question, whether the uses are not inconsistent and different, or whether the use for a sewer is not incidental to and within the use for a public street. The case of *Williams v. The Central Railroad Co.* (16 *N. Y.*, 97), is distinguishable from the present in most of its features. There, the dedication was for a street over and through the lands of the plaintiff, and the appropriation had been made to a railroad company, operating its cars and engines by steam at the rate of forty trains each day, along the lands of the plaintiff, for the exclusive profit of its stockholders. In the present case, the appropriation for the uses of a sewer is for the benefit of the public at large. A railroad, with numerous trains of cars thereon, is an impediment, an obstruction, above and upon the surface of the street, of the most serious and dangerous character. A sewer lies below the surface of the street, forms no obstruction, makes no noise, and creates no danger. A railroad, operated by steam in the streets of a city, is a positive injury to the adjoining property,

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and deteriorates its value. A sewer properly constructed in the centre of a public street, is positively beneficial to the adjoining property, and enhances its value. The Court of Appeals, in the case referred to, adjudged,—that the two uses, the one for a highway, and the other for a railroad, were inconsistent with each other, the latter use nearly superseding the former. That the land was subjected to a double easement. That the dedication of land to the use of a public highway, is not a dedication to the use of a railroad company. That the two uses are essentially different. And that, consequently, a railway cannot be built upon a highway without compensation to the owners. Now the uses of a public street in a city, and a sewer in the centre of the street, are not inconsistent with each other. They are not different. They are in harmony, both contributing to benefit the adjoining property. Where a sewer is constructed through a street already opened to the public, it takes nothing away from the owner of the adjoining land. He suffers no detriment and no injury, and should the law provide a mode of awarding him compensation, it would be a nugatory provision, for he parts with nothing of value.

Section 1, of title 4, of the act of the 17th April, 1854, to consolidate the cities of Brooklyn and Williamsburgh, &c., gives the Common Council power to cause streets and avenues to be opened and widened, regulated, graded, and paved, and to cause sewers, drains, wells, and pumps, to be constructed therein. The subsequent sections of the title prescribe the manner of opening streets, and estimating the value of the lands taken, and the benefit to be derived therefrom. There is much force in the suggestion, that in acquiring land for the uses of a street, the damages are estimated, and compensation awarded to the owner, not alone for the mere right to pass and repass, but also for the other uses, such as sewers, drains, wells, and pumps, referred to in the act. I do not, however, rely so much upon that, as I do upon the legal principles to which I shall refer. These are certain powers and privileges incident to the right of way which it may be well to notice. They may be classed generally as those which are necessary to the perfect enjoyment of the right to pass and repass.

There is the right to dig the soil and to use the material and timber for the repair of the road. It is evident, that as mankind

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progress in physical and material improvements, these incidental privileges must increase and be greatly enlarged. The mere right to pass and repass upon the surface of the ground would not fulfil the conditions of the highway at the present time. Among the first conditions of a good road is a level surface, and this implies the right to grade, reduce the elevations, and fill up the depressions. The right to do this would hardly be disputed. Another condition is, that the road should be kept free from accumulations of water. This would imply the power to make drains and sewers for its removal. Should this water collect upon the adjoining lands in consequence of elevating the depressed portions of the roadway, the right and the obligations of the public authorities would necessarily follow for its removal by drains and sewers. It has been held, that the right to erect toll-houses, and sink wells, followed as incidental to the grant of an easement for a turnpike-road. (Tucker a. Tower, 9 *Pick.*, 109.) These privileges, incidental to the use of a highway, must expand and multiply in regard to the streets and avenues of cities. The right to sink wells and cisterns has been freely exercised, and has not, as I am aware of, ever been disputed. Large and copious streams of water flowing through every street, and into every house, has now become a prime necessity in every healthy and habitable city. No one doubts the right of the corporate authorities to lay down the mains and pipes for this purpose in the public streets, without compensation to the owners of the fee. So it is with gas pipes distributed over the entire city. A comprehensive system of sewerage also becomes a necessity under such circumstances. And the right to construct the necessary sewers in the public streets, to remove and conduct away the water and impurities which collect therein, to the prejudice and peril of health and life, as well as from the adjoining lots, must from necessity exist as a right, incidental to the use of a street. When the public intervene with sanitary regulations like those contemplated by the act of the 15th April, 1857, no onerous and irksome burdens are imposed upon the landowners. "Such intervention on behalf of the public is not to be confounded with the old sumptuary laws, for it interferes with things, and not with persons. Nor can it be compared to attempts to regulate labor or wages, or to restrain trade. For it is not done to procure, by

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artificial adjustment of something which men can best settle for themselves, some speculative advantage; but on the principle of *salus populi suprema lex*, to protect one set of human beings from being the victims of disease and death through the selfish cupidity of others. The rules and operations for the protection of health in ancient Rome, were of a very radical and peremptory character, and allowed no minor interest to interfere with them. It seems to have been a rule with them, that from the time when the foundation of a city was laid, to that of the summit of its greatness, no structural operation, public or private, should be permitted to take a shape which might render it a harbor for disease or crime. And it is to this vigilant forethought, that in the absence of other organized agencies discovered only in our latter times, we may attribute the success with which that remarkable people preserved social order throughout so dense and vast a mass of human beings, as the inhabitants of the imperial city in the days of its greatness." It has been suggested that the opening and constructing of a sewer in a public street would conflict with the right claimed, and freely exercised by the owners of the fee in cities, of making vaults under the sidewalks, to be used as the depositories of books and other property. The question, however, still occurs, who have the superior right, the public or the owner of the fee, for if the right of drainage is incident to the use as a street, then, certainly, the construction and occupation of vaults below the surface, and within the line of the street, can be justified only when the public uses are not impaired or invaded. Indeed, I do not see how such structures can exist, except by the sufferance and permission of the public authorities. When completed, they may offer no impediment to the public travel, they may be secure against the superincumbent weight; but they cannot be constructed or repaired without creating a chasm or opening in the street, dangerous and detrimental for the time being, which the municipal authorities would have power to prevent. The case of *Plant a. The Long Island Railroad Co.* (10 *Barb.*, 26), was an action by the lessee of a messuage and tenement on Atlantic-street, in Brooklyn, over which the defendants had the franchise for a railroad, and under and through which it had also constructed a tunnel for its railway, under an ordinance of the Common Council. The plaintiff put

in issue the right to tunnel the street, and claimed damages for the injury to his business, which was that of selling goods. The general term, in New York, held he could not recover, and in delivering the opinion, Mr. Justice Edwards says: "Although a highway in the country is, as a general rule, needed for no other purpose than as a place of passage and repassage, yet the case is different as to a street in a populous and commercial city. There are many uses to which streets in large cities are usually appropriated for the promotion of health, trade, commerce, and public convenience, such as the construction of drains, sewers, and the laying water and gas pipes. These are servitudes which are highly beneficial to the public, and in no way injurious to the private rights of individuals. They do not interfere with the surface of the street. They in no manner impair the right of free passage and repassage. Neither are they injurious to the adjoining property. On the contrary, they are directly or indirectly advantageous." In these views I concur.

I conclude, therefore, that the plaintiff is not entitled to the injunction, and that the order of the City Court be affirmed, with ten dollars costs. .

TOWNSEND *a.* GOELET.

Supreme Court, First District; Special Term, October, 1860.

CLOUD ON TITLE.—PARTIES.

A grantor who has no longer any interest in the land, cannot maintain an action to remove an apparent lien thereon, as being a cloud on the title, on the ground that he agreed with his grantee that he would procure the lien to be discharged.

Demurrer to complaint, on the ground that it does not state facts sufficient to constitute a cause of action.

The substance of the complaint is contained in the following opinion.

Townsend *v.* Goelet.

Elbridge T. Gerry, for defendant.

Beebe, Dean, & Donahue, for plaintiff.

BONNEY, J.—The complaint in this action states, that on 27th June, 1859, the plaintiff and his wife conveyed certain lands in the city of New York to John P. Townsend, by deed recorded 28th June; that such conveyance (absolute on its face as I understand the allegation) was in fact made to secure John P. Townsend against loss by reason of his executing an undertaking on an appeal by the plaintiff from a judgment recovered against him and another, and that John P. Townsend had no interest in the lands, except as a trustee for the use or benefit of plaintiff and the other defendant in such judgment, and John P. Townsend paid no consideration for the conveyance to him; that in November, 1859, plaintiff sold said lands to John B. Corlies for \$50,000, subject to mortgages for \$33,000, and the balance of the purchase-money was paid to plaintiff; and at plaintiff's request, John P. Townsend and wife, by deed containing covenants of warranty, and against incumbrances, conveyed such lands to said Corlies; that defendant Goelet recovered a judgment in the Superior Court of New York against John P. Townsend, docketed on 7th March, 1859, for \$79.19; and the other defendants in this action have also recovered judgments against him which appear to be liens on the lands; in consequence of which, Corlies cannot sell the said lands without great loss; that at the time of the sale and conveyance to Corlies, plaintiff agreed with him "to procure the said premises to be released and discharged from the lien and operation of the said judgments against the said John P. Townsend," and gave him security for the performance of that agreement, and plaintiff prays this court to adjudge that said judgments against John P. Townsend are no lien or incumbrance on said lands, and that the judgment-creditors release the lands therefrom, &c. The defendant Goelet has demurred to the complaint.

In my opinion, the demurrer is well taken. The plaintiff, on his own showing, has no title to an interest in the lands upon which the judgment of Goelet is an apparent lien. All the title and interest he ever had therein have been conveyed to, and are vested in, Corlies; between whom and Goelet the question of

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the effect upon these lands of the judgment recovered by the latter against John P. Townsend, arises. If, as was urged by plaintiff's counsel on the argument, the lien be merely apparent, and the judgment only a cloud upon the title, it is upon the title in Corlies that the cloud rests. The apparent incumbrance and lien were obtained by Goelet after the title passed from plaintiff, and he is in no wise privy, or party to, or connected with the judgment, and has not covenanted against it, even if the deed by which he conveyed the lands contained any covenant, which does not appear from this complaint. Being no party to the judgment, nor holding title to the land apparently incumbered thereby, the plaintiff, as he states, agreed to procure the lands to be discharged from the lien of the judgment. I cannot see that such agreement can authorize him to maintain this action against parties, with whom, before making that agreement, he had no privity or relation whatever.

The view which I have taken of the case renders it unnecessary for me to consider whether the defendant has, upon the facts stated, a valid and substantial, or only an apparent lien on the lands in question.

Judgment must be rendered for defendant on the demurrer, with leave to plaintiff to amend the complaint in twenty days, on payment of costs.

MATTER OF FOURTH AVENUE.

Supreme Court, First District; General Term, 1854.

COMMISSIONERS OF ESTIMATE AND ASSESSMENT.—EXECUTION OF POWER BY MAJORITY OF THOSE TO WHOM IT IS CONFIDED.—CONSTRUCTION OF DEED.—DEDICATION.—TAXATION OF COSTS IN SPECIAL PROCEEDINGS.—APPEAL-PAPERS.

A deed referring to a street, without describing its width, must be taken to intend the width of the street as laid out at the time of the execution of the deed, though it had not then been opened to the full width.

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Of the effect of a release of a right to land used as a street, upon the dedication thereof.

The provision of the Constitution (*Const. of 1846*, art. 1, § 7),—declaring that compensation for private property taken for public use “shall be ascertained by a jury of not less than three commissioners,”—means that compensation is to be ascertained by the meeting, investigation, and conference of all the commissioners, and by the report of a majority, in case all cannot agree; and hence a report signed by two of the three commissioners, the other dissenting, is sufficient.

The provision of the judiciary act of 1847 (*Laws of 1847*, 645, § 38),—which declares that no county clerk shall tax costs on any case, except where the amount, exclusive of actual disbursements, is limited by law,—applies to special proceedings,—*e. g.*, proceedings in street cases,—but a judgment in such case is not necessarily erroneous because the clerk taxed the costs, though he should not have done so. The relief of the aggrieved party is by motion, and he cannot raise the objection on appeal from the judgment.

Where an appeal from a judgment confirming the proceedings in a street case, is brought by a part of the owners as to whom an award is made, every thing essential to show jurisdiction and regularity must appear in the appeal-papers; but that part of the commissioners' report which applies exclusively to other parties, and does not throw light on the appellant's case, may be stated in the most general terms.

Appeal from an order at special term, confirming the report of commissioners of estimate and assessment, in the matter of the application of the Mayor, &c., of the city of New York, to open Fourth avenue.

The facts are fully stated in the opinion.

By THE COURT.—MITCHELL, J.—On the 17th of January, 1852, a judgment was entered in the Court of Common Pleas for the city and county of New York, in a suit wherein Sampson McGown was plaintiff, and Levenworth, Danforth, Waterson, and Latson, defendants, that the plaintiff convey by deeds, to be dated 25th of November, 1848, to the defendants, respectively, or their assigns, the lands described in the judgment. The judgment is divided into sections: section 7 describes the whole of the lands in three subdivisions; the first describes the lands in it as bounded east by the Third avenue, west by the Fourth avenue, south by Ninety-ninth-street, and north by One-hundred-and-third-street, excepting a certain parcel.

Section 8 directs a conveyance to Bayard Clark, assignee of Latson, of two blocks, bounded east by the Third avenue, west by the Fourth avenue, south by Ninety-ninth-street, and north

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by One-hundred-and-first-street, excepting the parcel above excepted;—to T. W. Gale, of other pieces of land, one of which is bounded east by the Fourth avenue; another is bounded east by a line parallel to the Fourth avenue, and distant 175 feet therefrom, and west by the middle of the Old Post Road; another, bounded east by the Fourth avenue, and another running along the west side of the Fourth avenue.

Section 9 directs a conveyance to Danforth, or his assigns, of a block of lands bounded west by the Fourth avenue, and east by the Third avenue; and of thirty-two lots, bounded west by the Fourth avenue, east by a line parallel to the Fourth avenue, and distant 395 feet east therefrom; of a third piece, bounded east by the Fourth avenue, &c.; of a fourth piece, running along the west line of the Fourth avenue; and of a fifth piece, bounded east by the Fourth avenue.

Section 10 directs a conveyance to Waterson of lots bounded east by the Fourth avenue, and of the other lots bounded east by a line parallel to the Fourth avenue, and distant west therefrom 243 feet 3 inches.

Then follow these words in this section 10: "The Fourth avenue, herein referred to, being taken at the width of 100 feet, as originally laid out."

Immediately after that follows section 11, directing the costs to be paid by the respective defendants, and other matters. The judgment has, in all, 16 sections; but none except the 7th, 8th, 9th, and 10th, describe the lands.

McGown and wife, by deed acknowledged 28th February, 1852, but in pursuance of the judgment being dated the 25th of November, 1848, yet in no part of it referring to the judgment, conveyed to Bayard Clark in fee for the consideration of \$9,369.50, certain lands, with full covenants of warranty, and against incumbrances. The judgment was, that the land should be conveyed by such warranty deed, except as to the incumbrance of two mortgages executed by McGown to the commissioners, for loaning certain moneys. The deed contained no such exception.

The description of the lands in question is in the deed, substantially as follows: Two blocks of land, bounded east by the Third avenue, west by the Fourth avenue, south by Ninety-ninth-street, and north by One-hundred-and-first-street (except-

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ing the piece of land on the corner of Ninety-ninth-street and Third avenue, being 260 feet on Ninety-ninth-street, and extending along the avenue to the centre line of the block), together with all the right, title, and interest of the parties of the first part, of, in, and to Ninety-ninth, One-hundredth, and One-hundred-and-first streets, and the Third and Fourth avenues, adjoining said premises, or any part thereof, to the extent of one-half of such streets and avenues so adjoining the same.

Bayard Clark, in October, 1852, conveyed most of the lands in the block between the Third and Fourth avenues and One-hundredth and One-hundred-and-first streets, to Sluyter, describing the parcel as beginning at the southeast corner of the Fourth avenue and One-hundred-and-first-street, and running along the sides of the streets and avenues, but showing by the dimensions of the parcel that 920 feet were represented as being between the Third and Fourth avenues.

Sluyter conveyed to Houghton, by the same description as the last, the same lands, on the 1st of November, 1852.

In the general plan of the city as adopted by the commissioners under the act of 1807, Fourth avenue was laid out as only 100 feet wide, and the distance between the Third and Fourth avenues was 920 feet. By the act of 27th April, 1837, section 3, it was declared that all that part of the Fourth avenue, between Thirty-fourth-street and the Harlem River, should be widened, on the map or plan of the city, by adding thereto, on each side thereof, twenty feet of land, so as to make the whole width of that part of the avenue 140 feet; and this was to be with the like effect as if the avenue had been so laid out by the commissioners under the act of 1807.

The commissioners of estimate and assessment have given to Mr. Houghton only a nominal compensation for the part of the avenue taken from him, twenty feet (or eighty) by two hundred, while they have allowed about \$1,200 to the owner of the corresponding portion in the block next north, who probably had done no act to dedicate his lands.

The correctness of their decisions turns on the true construction of the deed to Clark. That deed makes no reference to the judgment—and it does not strictly conform to the judgment. The judgment directs the conveyance to be subject to two

mortgages; the deed makes no allusion to them. The judgment is to convey lands bounded east by the Third avenue, west by the Fourth avenue, south by Ninety-ninth-street, and north by One-hundred-and-first-street. This would be a dedication of the half of the Third avenue and Fourth avenue, and of Ninety-ninth-street and One-hundred-and-first-street, to the public, and would not require McGown to convey to Clark any of his right in those avenues and streets, and would give Clark a right to an absolute conveyance of the whole site of One-hundredth-street between the Third and Fourth avenues. But the deed conveys to Clark the lands bounded by those streets, and gives to Clark the right, title, and interest of McGown in the two avenues and three streets. The deed gave only the right of the grantor to Ninety-ninth-street, when the judgment required a full conveyance of it with warranty, and gave the right of the grantor in One-hundredth and One-hundred-and-first streets, and in the two avenues, which the judgment did not require to be given.

It is evident, therefore, that the parties did not mean to follow the judgment, both by their departure from it in these several instances, and their omission to refer to it.

It would be an imprudent rule to allow a judgment to control a deed between the absolute owner of land and the purchaser from him, when no reference was made in the deed to the judgment. The deed, being subsequent to the judgment, may have been made to differ from it purposely, because the parties voluntarily assented to the change, or concluded that the deed, as changed, would best carry out their contract. In this respect the case is entirely unlike a deed executed by an officer of the court, who has no power to act, except as the judgment directs. As between buyer and seller, the judgment is like a contract—the deed merges the contract. This judgment, too, was entered by consent, and thus is still more like a contract.

It is doubtful, also, whether the words in the ninth section of the judgment, describing the Fourth avenue intended, were meant to apply to the Fourth avenue, except where it occurred in that section of the judgment. If they were meant to extend through the whole judgment, still the deed should control, for the reasons before stated.

Then, what did the grantor and grantee mean to convey in

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this deed? It is not pretended that they meant to convey and to warrant the title to the full half of the two avenues and of the three streets, opposite the two blocks of land. The doctrine had become perfectly familiar that a conveyance of lands in that part of the city, bounding them on an avenue or street, was a dedication of the half of the street or avenue to the public, so as to entitle the grantor or grantee to only nominal damages on the actual opening of the street.

With this knowledge they executed a deed, in which the lands are thus bounded, and cautiously avoided bounding the lands by the middle of any of the streets or avenues, or by even the old line of the Fourth avenue. If McGown had an imperfect title, or no title to the whole site of the streets or of the avenues, he did not mean to subject himself to an action for breach of his covenant, of seizin or title, and so, if he had no title to this twenty feet, he meant to be equally protected; and, as this intention is derived from the face of the deed, it was equally entertained by grantor and grantee. They both intended to make a distinction as to the title which Clark should receive to the two kinds of property; as to that within the block, it was to be an unincumbered title, and that part was to be bounded on the streets and avenues, and was to be subject to all the incidents, and have all the benefits of lands so bounded. One of these incidents, beneficial to the grantee, although not to the grantor, was, that half of the streets and avenues in front of that property was dedicated to the public. The benefit to the grantee being that, when the street should be opened, the grantor would be entitled to only nominal damages for the lands to be taken. This left still in the grantor a small right in the site of the street, viz., the right to the fee of the street subject to this dedication; and, accordingly, after the conveyance by specific bounds, the deed proceeds and grants all the right of the grantor in the streets and avenues to the grantee. That right was not meant to be, and was not an absolute ownership, but only the right which remained in the grantor after the dedication. The only point in which the title to the site of the street differed from the title to the block, so far as it appears, was in this dedication, and, unless the dedication has effect, there would be no reason for the discrimination made in the deed.

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This was not the only property that McGown conveyed at the same time on the Fourth avenue and other streets, as the judgment shows; and it may well be that Clark and his grantees gain more by the dedication resulting from all the deeds, than they would lose by having only a nominal sum allowed to them in this case, and being exempt from paying their share for other lands taken, but thus dedicated by others.

The inference is, that the release of the right to the streets was not intended to affect the deed so far as to prevent a dedication to the public, which the law implies from the other words used in the deed.

This is substantially conceded in the argument, so far as regards all the streets and all the avenue, except the twenty feet added to it; but, it is contended that the Fourth avenue intended in this deed, was the Fourth avenue as it was before that addition. There is nothing on the face of the deed to show such intention; and the law which implies the dedication, implies from the fact of bounding lands on a street or avenue not opened, but directed by law to be opened or laid out for that purpose, that the grantor adopts the street or avenue as thus to be opened, and dedicates all within it to the public. The inference, therefore, always is, that the street or avenue as directed to be opened, when the deed was executed, was the one intended and referred to in the deed. There was in 1848 and 1852, at the periods of the date and execution of the deed, but one Fourth avenue; that was not yet opened, and was to be, when opened, 140 and not 100 feet wide.

If the judgment meant the old avenue, that meaning was not carried out in the deed; and the parties, probably intentionally, abandoned it, each finding it most to their interest to give or take what the deed described.

The counsel for Mr. Adriance objects that the report is not valid, because it is signed by two only of the commissioners, and insists that the Constitution of 1846-7 requires a concurrence of the three commissioners: he also objects that the judgment is bad, because the taxation of costs was by the clerk of the court.

Section 7, of article 1, of the Constitution, is, that when private property is taken for the public use, the compensation to be made therefor "shall be ascertained by a jury of not less

than three commissioners, appointed by a court of record, as shall be prescribed by law." The court then is to appoint the three commissioners, or more, and then the compensation is to be ascertained by the commissioners. The section does not say that the commissioners are all to agree; if it had said that the compensation was to be ascertained by a tribunal, or court, or board, consisting of three commissioners appointed by a court of record, the meaning of the section would not have been altered, for the commissioners are a tribunal, or board, for a specific purpose, and then it would have been plain that a majority could decide. It had long before been held, and it was declared anew in our Revised Statutes (2 *Rev. Stat.*, 555, § 27), that when any power or duty is confided by law to three or more persons, it may be performed by a majority of such persons, upon a meeting of all, unless special provision is otherwise made. This was a familiar principle of law, known to those who framed the present Constitution, and long before adopted, as it was found necessary and beneficial in practice, and it had never been complained of. It cannot be supposed that the framers of the Constitution intended to repeal it in this case, by a covert means: if they had intended to apply a new rule in this case, they would have sought to express their intention clearly and openly. It was said that the Constitution meant that generally more than three should be appointed, so as to make it certain that three should agree. The framers of the Constitution knew that to require so large a number to act would cause an unjustifiable burden in many cases,—as when a small strip is taken in the country for a private way,—and they would not have thus subjected their constituents to an unnecessary burden, without any good object, and without showing more clearly that such was their intent.

If five, or seven, or any larger number was appointed, it would not remove, but increase, the difficulty. The concurrence of all that are appointed is necessary, or of a majority only. For when the Constitution says that the compensation is to be ascertained "by not less than three commissioners, appointed by a court of record," it says in effect, that it is to be ascertained by the commissioners, to be appointed by the court, whatever that number may be, and requires that three at least shall be appointed—it is as if it had said "by three or any larger

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number of commissioners to be appointed by the court"—it is not by not less than three of the commissioners to be appointed by the court, which would be necessary to allow a majority only to decide, if the present clause has not that effect.

In fact, the damages are ascertained by the three, when the three meet together as a *quasi judicial tribunal*, and hear all the proofs and arguments of the parties in interest, and then decide according to the judgment of a majority: the dissenting member of the commission has acted with the majority, although he did not fully agree with them, and has probably led them in part to the conclusion to which they came.

The abstract of estimates of damages and benefits shows the dissent of one member, and his reasons for his dissent, and so shows that he did, in fact, act with the others, and attend their meetings. If he had not so attended, it should have been shown by the objectors.

The judiciary act of 1847, 645, § 38, provides that "no county clerk shall tax costs in any case, except where the amount thereof, exclusive of actual disbursements which the party, for whom they shall be taxed, shall be entitled to recover, shall be limited by law," &c. This is exceedingly broad in its language; it applies not merely to actions, but to "any case," thus including special proceedings as well as formal actions. Its object was equally extensive; it was to prevent clerks from exercising any power in the taxation of costs in any case, except in the cases where there was no chance of mistake as to the amount at which they were to be taxed, and except as to disbursements. Those were the cases in which the costs, exclusive of disbursements, were a mere trifle—certainly under \$50. This showed a legislative opinion that it was not proper to trust the clerk of a county with the taxation of costs, where the amounts would be large, and some judicial ascertainment might be necessary to determine what and how much they should be.

It was argued that it was to be inferred from the general tenor of this act, that it was not intended to apply to any thing but formal actions. This is not so. Section 3 applies to writs of error on suits or proceedings; section 13 regulates writs of *ne exeat* in suits and proceedings in the Supreme Court; section 14 applies to "proceedings in partition;" section 20 allows all papers, &c., in cases of special proceedings theretofore filed

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with the clerk of the Supreme Court, to be filed with the clerk of the county, &c.; section 22 speaks of "suits and proceedings in equity;" section 28 gives "power to order the sale of the real estate of a religious incorporation on its application;" section 31 directs the mode of proceeding when the judge of a county court is interested, &c., in a cause or matter pending before him.

The costs, therefore, should not have been taxed by the clerk. But does that make the judgment necessarily erroneous? If costs are improperly taxed, and that should appear on the face of the judgment, or on too short notice, or in any other irregular manner, the judgment would be good, and the relief of the party would be to move for a retaxation, which would be granted at the cost of the irregular party. When so effective a remedy is allowed to a party, he should not be permitted to raise the objection on appeal; or against the validity of the judgment. His only remedy should be by motion, and, if the decision there be erroneous, he should appeal from the decision made on the motion.

Some discussion took place as to what papers should be brought before the general term on appeal, in these proceedings.

Every thing that is peculiar to the case of the appellant, or which will aid in the decision of the questions raised by him, should be presented as fully as it was presented at the special term, together with every matter essential to show that the proceedings were regular, and that jurisdiction was obtained to give judgment. It is not necessary to include any part of the commissioners' report that applies exclusively to other parties, and which does not throw light on the appellant's case; that part may be stated in the most general terms—as, that various other sums were awarded to other parties for damages, and various sums assessed to other parties for benefit; and that the commissioners, among other things, awarded to the appellant § , and to A. B., whose land taken was similarly situated with the appellant's, except that it was not considered by the commissioners as dedicated, § .

This would be no innovation—for it was among the most familiar rules in pleading, to state in general terms the character of a process to bring a party into court, or to bring in a

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jury, and not set them forth verbatim,—as A. B. was summoned to answer C. D. in a plea of debt, or A. B. complains of C. D. in custody, &c., and in general terms it was stated that the jury were summoned and came, and were chosen, tried, and sworn,—without setting forth the summons, the trial, or oath. But still, if any question of the legality of the summons to the party or jury, or as to the choice, trial, or swearing of the jury, was properly raised, the facts would then be so stated on the record as to present that question for review. So, also, when issues of fact and of law were joined, the issues of law were alone inserted in the demurrer-book.

In this case, so much of the report as is above designated, and the other papers now submitted to the court, or so much of these last as either party may show to be material, should be inserted among the appeal-papers, and form part of the judgment to be entered, if either party wishes to carry the case further.

The report should be affirmed, with costs.

EDWARDS, J.—The claim which is set up by Houghton is not analogous to that which was made by the objectors in the cases of *Livingston v. The Mayor, &c.* (8 *Wend.*, 85), and *Wyman v. The Mayor, &c.* (11 *Ib.*, 486). In the first of these cases the objector was the grantor; and in the last, he claimed through the grantor of the lots, which were bounded on the street which was alleged to have been dedicated. In the present case the objector is himself the grantee of the lots bounded on the Fourth avenue, and the question is not whether he has dedicated the lots, but whether twenty feet of the avenue, as laid out by the act of 1837, was conveyed to him. It seems, that the description of the property; mentioned in the deed of conveyance to Houghton, was taken from the deeds which had been executed after the avenue had been laid out as a street one hundred feet wide, by the act of 1807, and before the passage of the act of 1837, which laid it out as a street one hundred and forty feet wide. In the deed executed by McGown to Clark in the year 1848, the old description was used; but it was stated that the Fourth avenue referred to was “to be taken at the width of one hundred feet, as originally laid out.” In the subsequent conveyance to Sluyter, and in the convey-

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ance by him to Houghton, there is no such definition of the meaning of "Fourth avenue." The lots are bounded on the Fourth avenue without restriction or qualification; and it seems to me that the description used can admit of no other construction than that the avenue meant, was the avenue as then laid out. The only Fourth avenue then existing, to which the description could apply, was an avenue of one hundred and forty feet width. There was at the time no Fourth avenue of one hundred feet width.

The next objection made to the report of the commissioners is, that it was signed by two of them, the other commissioner having dissented, and refused to sign it. This objection is founded in that provision of the Constitution which declares, that "when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law." (*Const.*, art. 1, § 7.)

It is an old rule of the common law, that in matters of public concern, and when the authority conferred is public, all of those to whom it is committed must meet and confer together; but that the voice of the majority shall govern, unless there is some special provision to the contrary. (21 *Wend.*, 182; 6 *Johns.*, 39, 41; 1 *Bos. & Pull.*, 237; 3 *T. R.*, 592.) And this rule is substantially embodied in one of the provisions of the Revised Statutes. (2 *Rev. Stat.*, 555.) It was with a knowledge of this existing law that the Constitution was adopted; and when it declared that compensation should be ascertained by not less than three commissioners, and introduced no special provision showing an intention to alter the law, it meant that compensation should be ascertained by the three commissioners in the manner in which similar acts had hitherto been performed; that is, by the meeting, investigation, and conference of all the commissioners, and by the report of a majority, in case all could not agree.

In reference to the claim of Mr. Burlock, I do not think that there has been such a deviation from the rules which have heretofore been adopted and acted upon, as would authorize me to send the report back to the commissioners.

The report must be confirmed.

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CLERKE, J.—(Concurring as to validity of report by only two commissioners; dissenting as to other matters.)—It is admitted in the case, by both counsel, that Margaret C. McGown, in 1835, conveyed to Sandford and others the block now owned chiefly by Houghton, bounding it on the west by “the Fourth Avenue,” but describing it as containing 920 feet in depth. By mesne conveyances, containing the same descriptions, and designating the boundary on the west by the same terms, the land was vested in S. B. McGown. On the 17th of January, 1848, a judgment was recovered against S. B. McGown, for a specific performance of a contract to convey this block; the judgment required that the conveyance should be of the block bounded on the west by the “Fourth avenue,” adding, in explanation of the term “Fourth avenue,” that “it should be taken at the width of 100 feet, as originally laid out.” The blocks in question were directed to be conveyed to Bayard Clark, an assignee of the plaintiff in the judgment. A deed bearing date the 25th November, 1848, as directed by the judgment, was executed by McGown to Clark, conveying the block, “together with all the right, title, and interest of the parties of the first part, to the adjoining streets and avenues,” and following the description in the judgment, although not adding in express terms, that the “Fourth avenue should be taken at the width of 100 feet, as originally laid out.” The judgment, indeed, is not referred to at all in the deed in direct terms; and one of its requirements is omitted, showing that there was some subsequent consent of the parties to modify it; but nothing whatever appears, either in the deed or otherwise, that it was their intention to vary the judgment in the dimensions or description of the premises, or in the degree, extent, or quantity of the interest directed to be conveyed. There is nothing to imply an intention by the grantor or grantee to alter the signification of the term “Fourth avenue,” except the omission in the deed of the explanatory words, which I have quoted from the judgment.

It is admitted, in this case, that Clark conveyed to Sluyter portions of the block, bounding it upon “the Fourth avenue,” and that, on examining the dimensions of the lots, it appeared that the block was conveyed by Clark to Sluyter as of the dimensions of 920 feet in depth.

The question, therefore, to be determined, is, whether Clark,

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on receiving the conveyance from McGown, pursuant to the judgment, accepted the land curtailed of twenty feet on its western line, bounding it by the "Fourth avenue" as widened, and not by the Fourth avenue, "taken at the width of 100 feet, as originally laid out;" for, if Clark did not consent to this, it cannot be pretended that any subsequent owner did.

What is the evidence that he consented, gratuitously, to relinquish so large a portion of his land for the public use? It is granted that there is no express and positive language or act indicating any such intention; but that there is enough in the vague manner in which the "Fourth avenue" is referred to (a term confessedly bearing two significations), to show a constructive dedication. I confess, I cannot see any thing in the proceedings of either of the parties, or in what is expressed or omitted in the conveyance, to warrant any such supposition—a supposition which would deprive a man of a large proportion of his land without compensation. We must bear in mind, that if the dedication was made at all, it was made by Clark; for, if I understand the judgment correctly, McGown was obliged to convey the land to the Fourth avenue, "taken at the width of 100 feet as originally laid out." These words, to be sure, follow section 10 of the judgment, which is divided into ten sections, each section relating to a separate portion of land, and directing to whom it is to be conveyed; section 8, relating to the block in question, directing the conveyance to Clark. Section 10 being the last, the explanatory words relating to the meaning of the term "Fourth avenue" were naturally and properly placed after that section, to save the necessity of repeating them after each of the ten sections; and there is no reason to suppose, from the circumstances, that these words should be more applicable to the tenth than to any other section in the judgment. But the explanatory reference is in itself conclusive; for, it says, that "the Fourth avenue, as herein used, should be taken," &c.—"herein" clearly signifying "in this judgment," not merely "this section," and that the object was to avoid tautology.

It is, therefore, to some act of Clark that we must look for this intention. No option was reserved to his grantor. By the judgment, I repeat, Clark was entitled to the 920 feet. It matters not what McGown intended without the concurrence

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of Clark; he was bound to convey to Clark the blocks containing those dimensions in depth. What reason is there for implying that the latter surrendered the right to twenty feet of those dimensions along the whole western boundary of this land, in the absence of the least tittle of proof of any adequate motive, or of any inducement or compensation, unless we are to assume in him a degree of civic worth, and public spirit, so rare, that it will be prudent not to presume the possession of it by any citizen in these degenerate days? To suppose that he gratuitously gave up this large strip of his land for the widening of one of the thoroughfares of the city would be implying more than we are authorized, at all events, from the circumstances of the present case, to presume.

The mere omission, in the deed from McGown to Clark, of the number of feet in the depth of the blocks, does not warrant any such supposition; especially when we consider that in eight months after the execution and delivery of this deed he expressly shows that he contemplated no such thing. In the conveyance of Clark to Sluyter, in October, 1852, the block is conveyed as of 920 feet in depth; of course, to the original line of "the Fourth avenue,"—the hundred feet wide "Fourth avenue;" which most people knew to be the only "Fourth avenue." How then can it be inferred, that when he received the conveyance from McGown, he relinquished his right to what the judgment gave him? Here is an express assertion of his right, in opposition to a very equivocal omission of words, which were merely explanatory, and which left the term "the Fourth avenue," without those words in McGown's deed, to say the least, as capable of one interpretation as the other. Clark knew, I presume, if he had dedicated the land to the public use, and was content to accept the block from McGown, bounded by the contemplated line of the Fourth avenue, as directed to be widened by the act of 1837, its depth from the Third to the Fourth avenue would be only 900 feet.

The mere circumstance that the conveyance from McGown to Clark did not specially refer to the judgment, and that there seemed to be some deviation from it in other respects, is a very insufficient reason for concluding that he was willing to depart from the substance of the judgment, so essentially, as to abandon, without any apparent consideration or compensation, or

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adequate motive, a considerable portion of the property to which it entitled him. The only safe rule, and the only rule by which the constitutional right to private property can be preserved, is to reject all doubtful claims of dedication; and, for my part, I would reject any claim not considerably more explicit than this.

If we are not willing to forget where we are—that we are living under a political *régime*, which regards private property as most sacred and inviolable, and that we are not living in the meridian of St. Petersburg or Grand Cairo, we should in all cases insist, as this court at general term in this district has before insisted, that a constructive dedication can only be effected by clear, unequivocal, and decisive acts of the owner, amounting to the explicit manifestation of his will to make a permanent abandonment of the thing dedicated.

For these reasons the order confirming the commissioners' report should be reversed.

I fully concur with my brethren on the other questions presented in this matter.

Order affirmed.

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Supreme Court, First District; Special Term, October, 1860.

CORPORATION.—POWER OF DIRECTORS.

The directors of a corporation have no power to sell the entire movable property of the corporation; and such a sale made by them, is void as against such stockholders as do not assent.

In an action by a stockholder to set aside such sale, an injunction should be granted, and a receiver should be appointed.

Motion for an injunction, and appointment of a receiver.

In the voluminous moving papers of the plaintiff, it was shown that, in 1850, Charles Goodyear, who had then recently

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invented his processes of vulcanizing india-rubber, applied to the plaintiff, and solicited him to take an interest in the development of the new invention in its applications to educational apparatus. Some negotiations took place, the result of which was that Mr. Goodyear gave the plaintiff certain powers over the use and application of the invention to the manufacture of maps, charts, globes, blackboards, slates, &c. A corporation was subsequently organized, known as the Beacon Dam Company, in which the plaintiff became a stockholder, and the name of which was subsequently changed to the American Hard Rubber Company. The rights and powers vested in the plaintiff by Goodyear, were, by the plaintiff, transferred to the Beacon Dam Company; and he also contributed a large portion of the funds required in its establishment, and the erection of its buildings, purchase of tools, machinery, &c. Quite lately, the directors of the company negotiated a sale of all its property to Messrs. Poppenhusen & Konig, two of the defendants. This sale being against the wishes of plaintiff, he brought this suit to restrain defendants from carrying it into effect.

The bill contained charges of fraud in the sale; but the decision of the case chiefly turned on the question of the power of the directors of a company to sell out its whole assets without the consent of stockholders.

The answer of defendants denied all fraud in the sale, and averred that it was a fair, honest, and true sale, and for a full and valuable consideration.

E. W. Stoughton and *D. E. Wheeler*, for plaintiff.

S. A. Foot and *W. A. Curtis*, for defendants.

SUTHERLAND, J.—I think the sale and transfer by the four directors—Judson, Ropes, Norton, and Henry B. Goodyear—to Poppenhusen, Konig, and Funke, of the entire property of the company, except its real estate, with its machinery and fixtures, was void as to the plaintiff, and such other stockholders as did not consent to or authorize the sale.

I do not think that it appears that a majority of the stockholders did, in fact, authorize the sale; but had the sale been authorized by a majority of the stockholders, or by stockholders

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representing a majority of the stock, I think it would have been void as to the plaintiff and other stockholders not consenting to or authorizing it.

In looking at this question as to the power and authority of the directors to make the sale and transfer, with or without the authority of a majority of the stockholders, so as to be valid as to and bind the stockholders who did not consent, in this case, and as between these parties, the company should be considered as chartered and organized for the sole purpose and object of manufacturing goods or articles of india-rubber, or of its patented compounds, under the Goodyear patents.

The corporation, as originally organized in May, 1852, with a capital of \$25,000, composed of 1,000 shares of \$25 each, was called the Beacon Dam Company, and would appear to have been organized for the object and purpose of building and maintaining a water-power on the Naugatuck river, in Connecticut, and for carrying on a manufacturing business generally. The name was subsequently changed to "American Hard Rubber Company," and in January, 1853, the capital stock was increased from 1,000 shares of \$25 each, to 4,000 shares of \$25 each, the plaintiff subscribing for and taking the 3,000 additional shares, retaining 1,000 of them, and distributing the other 2,000 among different parties.

The increase of capital took place solely with reference to the business of manufacturing india-rubber goods, under the Goodyear patents; and all the stockholders agreed from that time to enter upon and prosecute exclusively the business of manufacturing articles of the patented compounds of india-rubber; and from that time until the sale, by the directors, to Poppenheusen, Konig, and Funke, in February, 1860, the manufacture and sale of such articles would appear to have been the only business of the company.

I think, therefore, that, as between these parties, and for the purposes of this decision, I must consider the sole and only object and purpose for which the company was organized, the business which it carried on, and which the directors who made the sale were elected to direct and manage, to have been the manufacturing and selling of goods or articles of india-rubber, or of one or more of its compounds, under the Goodyear patents.

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That being so, I think the sale in question was void as to the plaintiff and other stockholders not consenting, because its effect was, and must necessarily have been, to discontinue all business of the corporation,—in effect to dissolve it; and I must presume on the conceded facts of this case, that the parties to the sale knew or anticipated that such would be the effect and consequences of the sale.

The directors sell in one lump, not only all the stock of the corporation, manufactured and unmanufactured, but all rights of the corporation under the patents to manufacture any more, and all its property of every description, except the water-power and real estate, with its machinery and fixtures, in Connecticut, which they at the same time lease to Poppenhusen & Konig, for one year; thus, by this sale, discontinuing or destroying all the business of the corporation for a term, at least; and by the sale of the patent rights, or of the corporation's right to manufacture under the patent rights, forever putting it out of its power, without repurchasing the right to do so, to further prosecute the only object, and purpose, and business for which it had been organized, and which it had prosecuted; and thus leaving the corporation a mere skeleton, with a name, and perhaps a legal technical existence by the statute-book, but without real life, or business, or usefulness.

I do not think the directors, even with the consent of a majority of the stockholders, had a right, as against stockholders not consenting, thus in effect to discontinue its existence, and defeat the object of its organization.

I must assume that these directors were chosen to manage the business of the corporation, not to destroy and end it.

If the corporation were insolvent, it is presumed the laws of Connecticut had provided a mode of having it dissolved; if it had good cause to surrender up its franchises to the government, it is presumed the laws of the same State had also provided for that. But I cannot presume that the directors, or a majority of the stockholders of the corporation, by any law of Connecticut or otherwise, had a right thus, by voluntary sale, to discontinue its existence, and in effect surrender its franchises, without consulting the government or its creditors, and without the consent of a majority of its stockholders.

To hold that the directors could thus discontinue, wind up,

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and defeat the purpose, object, and business for which the corporation was organized, even with the consent of a majority of the stockholders, so as to bind the minority not consenting, would, in effect, be depriving the minority, and every one of the minority, of their property without their consent.

No doubt that the principle that a majority must govern or control (in the absence of any special provision in the charter or constitutional articles), applies to corporations; and that the minority are bound by the acts of the majority, when those acts are within, and according to the charter or constitutional articles of the corporation; and not inconsistent with the object and purpose for which it was organized. Such acts a stockholder consents to by becoming a member of the corporation, because he is presumed to know the law, and the rights of the majority by the law. But this democratic or representative principle does not apply to an act or acts of the majority, inconsistent with the continued existence of the corporation, and the very object and purpose for which it was organized; nor does a stockholder consent to such acts by becoming a member, because the law does not justify them; and he cannot be presumed to have anticipated or thought, that such acts would ever be perpetrated or attempted by the majority.

I cite the following authorities as supporting or illustrating the principle on which I hold the rule in question void for want of authority, as to the plaintiff and other stockholders not consenting, assuming it to have been made by a majority of the stockholders. (*Livingston a. Lynch*, 4 *Johns. Ch.*, 573; *Conro a. Port Henry Iron Co.*, 12 *Barb.*, 62, 63; *Ward a. The Sea Insurance Co.*, 7 *Paige*, 294; *Hartford and New Haven Railroad Co. a. Groswell*, 5 *Hill*, 384; In the matter of *Niagara Insurance Co.*, 1 *Paige*, 257; *Slee a. Bloom*, 19 *Johns.*, 456; *Rollins a. Clay*, 33 *Maine*, 132; *Smith a. Smith*, 3 *Des. (S. C.) Ch.*, 557; *Kean a. Johnson*, 1 *Stock.*, 401; *New Orleans, Jackson, and G. N. Railroad Co. a. Harris*, 27 *Miss.*, 517; *Hare a. Society Attorneys*, 1 *Collyer*, 370; *Bagshaw a. Easton County Railroad Co.*, 7 *Hare Ch.*, 114; *Bank of Com. a. Bank of Brest, Haring. Ch. (Mich.)*, 106, 10, 11; *Town a. Bank of River Raisin*, 2 *Doug. (Mich.)*, 536; *Ang. & Ames on Com.*, §§ 499, 500, *et seq.*)

The sale and transfer in question was not, and did not pur-

port to be a sale of the property of the corporation for the benefit of its creditors. If the property was sold for its full value, the creditors would have a right to complain; for it was not a sale for money, but for promissory notes payable at a future day; and although the notes may be good, and the makers abundantly responsible, yet the corporation or its directors had no right to compel the creditors to wait until the notes were paid.

In passing the resolution relied upon by the defendants as an authority by a majority of the stockholders to make the sale and transfer, it would appear that a majority of the shares voted on, were voted on by proxy. I must presume, in the absence of any thing to show the contrary, that these proxies were ordinary proxies, given with reference to the transaction of the ordinary and legitimate business of the corporation, and that they did not, and could not authorize votes for so extraordinary a sale and transfer as the one in question. Hence the resolution cannot be said to have been in fact passed by a majority of the stockholders, and its passage can hardly be claimed as an authority by the majority.

A similar remark may be made as to the Connecticut statutes referred to by the counsel for the defendants, authorizing a majority of the stockholders to transact business; and not less than three directors to manage the affairs and business of corporations; these statutes must be presumed to have been intended to apply to the ordinary and legitimate business of corporations, and not to so extraordinary a proceeding as the sale and transfer in question.

The purchasers cannot be considered as *bona-fide* purchasers for value without notice, for they did not give money or value, but their notes or promises to pay; and I must assume from the conceded facts of this case, that they knew the purpose and object for which this corporation was organized, and the only business which it had prosecuted; and as they must also be presumed to know the law, I must also presume that they knew that directors, with or without the consent of the stockholders, had no right or authority to make the sale and transfer in question to them.

It is not necessary to pass upon the other two grounds upon which the counsel for the plaintiff insist that the sale was void;

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to wit: fraud in fact, and as being in contravention of the equitable principle or rule, that a trustee cannot, directly or indirectly, become the purchaser of the trust-property for his own benefit; for if the sale in question was void, as to the plaintiff and other stockholders not consenting, on the ground that it was made without their consent or authority, the other two grounds, however well taken, could not make a void thing void.

The sale being void, as to the plaintiff and other stockholders not consenting, it follows, I think, that the temporary injunction should be continued, and that a receiver is necessary to preserve the property of the corporation within the jurisdiction of this court, for its creditors and stockholders, until the final decree in the action, or in the action in the Circuit Court of the United States, in aid of which it would appear that this action was brought, or until its dissolution may be decreed by the courts of Connecticut.

I shall accordingly continue the injunction, and make a reference to Hon. William Mitchell to appoint a suitable and proper person as receiver, with the usual powers, and take and approve of the necessary and usual security for the faithful performance of his trust.

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New York Common Pleas; General Term, October, 1860.

COUNTER-CLAIM.

When the complaint is for a conversion, a demand against the plaintiff on a cause of action not connected with the same transaction, cannot be set up as a counter-claim. The fact that the summons in the action is in a form suited to an action on contract, instead of an action for a wrong, does not qualify the nature of the action.

Whether tort is intended to be waived, must now be determined by the facts set out in the complaint.

A counter-claim must have belonged to defendant at the commencement of the action.

Appeal from an order of the special term, sustaining the plaintiff's demurrer to the answer of defendant.

The complaint alleged that on March 30, 1859, the plaintiff possessed and owned certain personal property of the value of \$640, and on or about that day, the defendant obtained such property, and wrongfully converted it to his own use; that before the commencement of this suit, the plaintiff demanded it of the defendant, who refused to deliver it; whereupon, judgment was demanded for \$640, with interest from April 12, 1859, the day of making such demand.

The action appeared, from the verification to the complaint, to have been commenced April 13, 1859, and the answer of the defendant was sworn to on May 3. In it was set up, as a distinct defence, a counter-claim arising out of the recovery of a judgment for \$396.61 against the United States Gutta Percha Belting and Packing Company, in the Marine Court, in favor of Augustus Cleveland, on March 15, 1859, and on which an execution had been issued and returned unsatisfied. It was averred that the company was organized and incorporated under the provisions of article 2, title 12, ch. 18, part 1, of the Revised Statutes, and the plaintiff having been stockholder, trustee, and president thereof, had become liable for all the debts of the company, by reason of the failure of the company to comply with certain provisions of law affecting companies organized for manufacturing purposes.

The plaintiff demurred to this defence; and the court at special term gave judgment in favor of the plaintiff on the demurrer. The defendant then appealed to the general term.

BY THE COURT.—HILTON, J.—(After stating the facts.) It is argued that the plaintiff having issued a summons in the form prescribed in actions brought for a money-demand arising upon contract, and also having attached to the complaint a demand of judgment for a specified sum with interest, it must be presumed that the tort arising from the wrongful conversion of the property referred to, has been waived, and the action is, therefore, to be regarded as resting upon the contract which the law implies in such cases; and as the counter-claim set up arises from a contract also implied by law, growing out of the penalty,

a debt which the statute imposes upon certain persons who violate the provisions, it therefore falls within subdivision 2, of section 150 of the Code, which permits a counter-claim to be interposed of this character, where it exists at the commencement of the action, and the action arises upon contract, express or implied.

That the counter-claim may properly be said to arise upon contract, I am willing to concede, as whatever the law orders any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge (3 *Blacks. Com.*, 158), and the claim in the answer thus falls within that class of contracts which are implied by law; but I am not prepared to admit that the cause of action set out in the complaint is one arising on contract; on the contrary, I think it quite obvious, the suit is for a tort committed by the defendant in wrongfully converting to his own use certain property of the plaintiff of the value of \$640, for which amount, with interest from the time its return was requested, and which may be considered in the nature of damages claimed, judgment is demanded. The fact that the summons was not in the form prescribed for actions of this kind, merely shows an error of the attorney in this particular, which might have been taken advantage of before answer by the defendant's moving to set aside the complaint for the reason that it did not conform to the summons (*Tuttle v. Smith*, 6 *Abbotts' Pr.*, 329, and cases cited; *Davis v. Bates*, *Id.*, 15; *Shafer v. Humphreys*, 15 *How. Pr.*, 564); but by answering, any variance or defect of this nature is waived, and thereafter it becomes entirely immaterial what the particular form of the process was by which the party has been brought into court.

It is, however, insisted, that from the plaintiff's proceedings, the court should infer that the tort has been waived, and the action would, therefore, be regarded as resting on the implied contract; but, even if this were so, it could not help the defendant, or permit him to assert his counter-claim by way of defence; the action would still be one arising on a tort, and not arising on contract, although the plaintiff might have waived any remedy which the law afforded him by reason of the tortious acts of the defendant. The waiver would not alter the facts which constituted the foundation of the action, nor bring the

suit within the class wherein the Code allows a counter-claim arising upon contract, to be interposed by way of defence. (*Piser v. Stearns*, 1 *Hilt.*, 86.)

It might have been otherwise under our former system of pleading, when the tort would not only be waived by bringing the action of *assumpsit*, but the suit in that form would have been subject to all the rules of set-off applicable to actions upon contracts; but I agree with Judge Brady, that under our present system, no such rule of practice or of law exists; and that the character of the proceeding, whether the tort is intended to be waived or not, must now in all cases be determined by the facts set out in the complaint as constituting the cause of action; and if upon those facts it appears that the action did not arise on contract, and that the plaintiff would be entitled to an order for the defendant's arrest, the suit must be regarded as being founded in tort.

But there is another, and, in my opinion, equally fatal objection to the counter-claim set up, arising from the fact that it did not belong to the defendant at the time of the commencement of the action. As I before remarked, this suit appears to have been commenced in April, and although the judgment had been recovered previously, yet it was not transferred to the defendant until May 3. To permit a claim thus acquired to be interposed as a defence, would be to depart from the general rule by which actions are determined according to the rights of the parties as they existed at the commencement of the suit; and although the Code (subdivision 2, of section 150) does not say in express terms that the counter-claim must exist in favor of the defendant, and have belonged to him at the commencement of the action, yet I think it should be understood in that sense, as otherwise it would be in effect creating an anomaly in the law, which should not be presumed in the absence of positive language declaring such to be the intention of the Legislature. (*Van Valen v. Lapham*, 13 *How. Pr.*, 240; *Leman v. Trull*, *Ib.*, 250; *Gage v. Angell*, 8 *Ib.*, 335.) This is the rule applicable to set-offs under the Revised Statutes (see 5 ed., vol. 3, 635, § 12, subd. 4), and I think the Code (see 150) should be construed in connection with that provision. (*Pattison v. Richards*, 22 *Barb.*, 143.)

Order at special term affirmed, with \$10 costs.

Lee a. Dill.

LEE a. DILL.

Supreme Court, Fifth District; General Term, October, 1860.

WILL.—UNDER INFLUENCE.

Before a will, the execution of which was obtained from the testator by the party claiming under it, under circumstances indicating undue influence, can be admitted to probate, it must appear affirmatively that it was made by the testator when he had intelligence to comprehend its provisions, and independence to adopt or reject them.

If the provisions of a will executed by an old and feeble man, differ from his previously expressed intentions, and differ in favor of those who stood in confidential relations with him, it is evidence of fraud and undue influence, which must be overcome by the most satisfactory testimony that the testator understood its provisions, and acted freely.

Appeal from an order made by the surrogate of the county of Onondaga, admitting to probate the will of the late Samuel Dill.

The facts in the case are stated in the opinion of the court.

Fuller & Barrett, and *David Pratt* and *Charles B. Sellgwick*, for the appellant.

Finlay M. King, *John P. Hulbert*, and *Amasa J. Parker*, for the respondents.

BY THE COURT.*—MORGAN, J.—Samuel Dill, the testator, was ninety years of age when he died, and he made his will the same year, by which he divided the bulk of his property, amounting to some forty or fifty thousand dollars, between his two children, Robert L., the respondent, and Cornelia A., the appellant. He gave Robert L. the largest share, and made him the executor, and also a trustee to manage the share devised to Cornelia A. for the benefit of herself and children.

* Present, W. F. ALLEN, P. J., and MORGAN and MULLEN, JJ.

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He was a man of intemperate habits, and blind, although he retained his mental faculties in a remarkable degree up to the time of his decease.

For a few years previous to his death, he intrusted the management of his affairs almost entirely to his son Robert L., who lived in his family, and obtained his confidence. The daughter, Cornelia A., had left the village against her father's wishes, and had gone to reside with her husband in a distant village.

There is evidence tending to show that the testator intended to divide his estate equally between his son and daughter; and there is no evidence, except what is furnished by the will itself, that he ever changed his mind, except to recompense his son in taking charge of him and his property after he himself became unable to attend to his own affairs.

There are also circumstances to create a suspicion that after Cornelia A. left Camillus and went to Newark, relatives of Robert L. Dill's family took some pains to create a state of alienation between the testator and daughter; but I do not think there was sufficient cause to enlist his indignation against her, or that the old gentleman was influenced by any hostile feelings towards her in making his will. He still declared his intention, so far as he has spoken in the evidence, to make his son and daughter equal in the distribution of his bounty.

We cannot doubt, upon the evidence, but that the testator was capable of making a will, when the will in question was executed; nor do we understand that it is claimed by the appellant that he was not competent. On the contrary, she attacks the will because she alleges that it was produced and executed by means of fraud and undue influence.

Upon such a question, it is a matter of considerable importance to examine the condition of the testator's mind, as well as the means used to procure him to make a particular disposition of his estate.

When we consider that the testator was ninety years old, that he was dependent upon his son, Robert L., to manage his business, was blind, and occasionally excited by the intemperate use of liquor, we cannot regard him as in that state of independence where he could easily withstand the importunities of those who had acquired his confidence, to obtain his signature to a paper, which in his earlier days, he might have resisted and rejected.

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We are not informed, what were the provisions of his prior wills. It would have been a strong circumstance to support the will in question, if it had been shown that the main features of it were consistent with the provisions of his prior wills. So far as we know of his well-formed intentions, he designed to make his son and daughter equal in the division of his estate. He had a right to change those intentions, and give his son not only the greatest bulk of his property, but to make him trustee, to receive and manage what he intended for his daughter and her children; but he was blind, and could not read the provisions of the will in question. It must be shown in some way, therefore, that he knew the contents of the will, and was not imposed upon. (*Jarm.*, 47.)

It was not read to him in the presence of the witnesses, nor did he ever explain its provisions to any of his friends, so that we can see that he knew what its particular provisions were.

The draftsman, who was rather the agent of the son to procure a particular will, than the unprejudiced adviser of the old gentleman, says that he read the will over to him after it was engrossed; but he does not give such a history of the transaction as to satisfy us that he himself understood it, much less that the old gentleman understood it. It is said that it was drawn from the directions given by the old gentleman; but the evidence shows that the will was copied from a draft of a will, with slight variations, which was got at by the aid of one Henry Field, a short time previous. Mr. Field, a nephew of the old gentleman, was employed by him to make an inventory of his property, and assisted in "getting out the figures for him to draw his will." Robert L. requested Mr. Field to help in the figures, and thought he ought to be figured \$9,000 better than his sister Cornelia, among other things, to cover some losses in a former speculation, in which he alleged his sister should bear a share; and the draft made on this occasion was handed over to Mr. Filly, and from this draft the will in question was finally drawn, with slight variations only.

It is, therefore, proper that we should examine into the testator, and the circumstances of the case at that time. The books were in Robert's hands; Robert gave Field the figures, or dates to make the figures, and the whole of the data to figure from; and he desired Field to talk with his father, and satisfy

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him that he ought to have \$9,000 more than his sister. Some of the provisions were copied from an old will, and were furnished by Robert L. Field, who was there about two weeks, off and on, in making out this draft. He says it was hard work for the old gentleman to understand some of the provisions. He did not understand Robert's figures readily, and finally, when he got troubled, referred it to Field and Robert, and enjoined them to fix it up right and do right.

He placed confidence in them to make it out right, rather than in his own judgment. Possibly he understood fully what the will contained; but under the circumstances of the case, I think the burden of proof is cast upon the respondent to show it. There may be good reasons which the old gentleman had to charge his daughter with a portion of the loss on the steam-mill speculation; but the case fails to show a clear statement of them. The will is ingeniously drawn to cover future advances to Robert L., so that if the old gentleman had lived long enough, and his hostility to his son-in-law, William H. Lee, and his daughter, had become sufficiently excited, his advances to his son might have swallowed up the entire estate.

Who is there to explain why this provision was inserted? The old gentleman may have fully understood it, but the case does not show it.

Before a will thus obtained can be admitted to probate, it must appear affirmatively that it was made by the testator, when he had intelligence to comprehend its provisions, and the independence to adopt or reject them. If it be admitted in this case that Mr. Dill had both, there still remains the difficulty, viz.: that instead of canvassing the various provisions of the will in his own mind, until he understood them,—instead of mastering the figures which perplexed him, he yielded to those who had an interest in misleading him, and trusted to them to do right. At his age, and in his condition, it was easier to trust them than go through the mental labor of ascertaining the truth of the matter for himself. And now we think his son, who is so much benefited by the unequal provisions of this will, must satisfy the court and a jury that he did not abuse the confidence which the old gentleman reposed in him; but that he fixed it right in accordance with the known wishes and intention of his father.

In *Creely v. Ostrander* (3 *Bradf.*, 107), the will was read over to the deceased, by Mr. Lawrence (a counsellor of this court, who was employed to draw it), deliberately, paragraph by paragraph, and as each section was read, he was asked if he understood it, and if it was correct. There was not a trace of improper dealing or undue influence; and although the testator was eighty-four years of age, and enfeebled by disease, the surrogate very properly pronounced in favor of the will.

In *Moore v. Moore* (2 *Bradf.*, 261), the surrogate admitted the will to probate, although the testatrix was eighty-four years of age when it was made. There was some evidence of a failure of mental power, but it was affirmatively shown that the testatrix acted with intelligence, and fully understood the effects of what she was doing, and that the provisions of her will were in accordance with her intentions expressed at other periods.

In the absence of evidence, the court will not presume that the testator has been imposed upon by those who stand in confidential relations to the decedent.

But if the provisions of a will executed by an old man differs from his previously expressed intentions, and if it is made in favor of those who stand in confidential relations with the deceased, there is evidence, and we think a violent presumption, of fraud and undue influence; and that it must be overcome by the most satisfactory testimony, that the testator fully understood its provisions, and acted freely and voluntarily in the final disposition of his estate. It must be his will, and not the will of those who are in a position to deceive and mislead him. In case of old age, when blindness has prevented the testator from reading the provisions of a will for himself, it should be made to appear that the will was read over to him carefully, paragraph by paragraph, and that he not only comprehended, but assented to its various provisions. (*Mowry v. Silber*, 2 *Bradf.*, 133; *Crispell v. Dubois*, 4 *Barb.*, 393; 16 *Ib.*, 198; 30 *Ib.*, 134; 1 *Jarm.*, 40-47.)

As we understand this case, the respondents are required to remove all grounds for suspecting that the will was procured by improper means, and unfair practices. While we think the testator was competent to make a will, the circumstances under which the will in question was procured, are such, that it must

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be made to appear that the decedent was fairly apprised of its provisions and its effects, and fully understood them, before it can be admitted to probate, as a valid will. There is reason to fear that many people are induced to make wills, by those who are in a position to deceive and mislead them, which do great injustice to other members of the same family, and which ought not to be sanctioned by the courts. It is often difficult, if not impossible, to trace out the unfair means which are used to procure them.

We think the law, if faithfully and rigorously maintained, is sufficient to frustrate the fraud in a majority of such cases. That requires the most satisfactory proof, that the decedent, who is old and infirm, should be free to choose upon whom he will bestow his bounty. To exercise this freedom, we think it should always be shown that the decedent was in an independent position, and entirely removed from the importunities of those who are named as his principal beneficiaries, to the exclusion, or partial exclusion of others who have an equal claim upon his bounty; and we think that it should appear that the decedent in such a case, was fully informed, or fully understood what he was about, and what would be the effect of the various provisions which are put into his will. It should not be procured by one or two members of the family, while the other members were beyond the paternal roof, and entirely ignorant of what was being done in their absence.

We do not say that all the members of the family should be sent for and consulted; but we do say, that in their absence, the decedent should have the benefit and advantage of some counsellor or friend, who stands in no doubtful relation to the family, and with whom the decedent could freely express his wishes and intentions, and upon whom he could rely for aid and assistance in carrying his intentions into his will. We speak of that class of wills, where certain members of the family who have the opportunity, succeed in obtaining an advantage over others, equally worthy to share in the division of the estate. Where all are fairly and equitably comprehended in the bounty of the testator, there is no occasion for imputing fraud or undue influence to any one.

There is no doubt but an old man of eighty, ninety, or even one hundred years of age, may make a valid will, giving all, or

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the greatest portion of his large estate to one member of the family. If he is free to act as he pleases, and fully comprehends what he is doing, his will must stand. (5 *Johns. Ch.*, 158.) But the courts ought, we think, to be careful and vigilant in such a case, to require the most undoubted evidence that he acted freely, and that he fully understood himself.

While we would not undertake to examine too critically his reasons for such an act of favoritism, we ought to require proof that he did what he did because he was free, and could do as he pleased with his property, and fully comprehended the effect of what he was doing.

The result is, that the order of the surrogate must be reversed, and an issue awarded to try the question at the next Circuit Court, the costs of the appellant to abide the event. (2 *Rev. Stat.*, 66, § 57 *Laws of 1847*, ch. 280, § 1.)

BROOKS *a.* STONE.

Supreme Court, Eighth District; General Term, 1860.

CREDITOR'S ACTION.—CREDITOR BY ATTACHMENT WITHOUT JUDGMENT.

A creditor by attachment, but before judgment, cannot maintain a creditor's action.* The provision of section 219 of the Code, allowing an injunction when it is made to appear that the plaintiff is entitled to the relief, and some part of the relief consists in restraining an act which, during the litigation, would injure plaintiff,—does not authorize an injunction to set aside a fraudulent lien upon property of the defendant, against which the plaintiff has obtained an attachment.

The provision of the same section, that when the defendant, pending the action, does an act in violation of plaintiff's rights, respecting the subject of the action, he may be restrained by injunction,—does not apply to such a case. The property attached cannot be deemed the subject of the action.

* Compare, however, *Thayer a. Willet* (9 *Ante*, 325). *Hall a. Stryker* (*Ib.*, 342). And see *Falconer a. Freeman* (4 *Sandf. Ch.*, 565), where it was held by the vice-chancellor, That creditors at large who have obtained a warrant of attachment under the statute relative to non-resident debtors, which they are prevented, by fraud, &c., from levying, acquire thereby a lien as valid and effectual as in the case of an execution at law; and a court of equity will enforce it in the same way for the benefit of all creditors, without preference.

Appeal from an order vacating an injunction.

The plaintiff in this action had obtained an injunction, under section 219 of the Code, restraining a sale of the real property of his debtor, one of the defendants, under judgment and execution in favor of another defendant. The grounds on which the injunction was obtained were, that the judgment was confessed without consideration, and in fraud of the rights of creditors, and that the plaintiff had thereafter commenced an action against the debtor, and procured an attachment, upon which he had attached the real property which was now advertised to be sold under the judgment which he sought to impeach.

At special term, the injunction was dissolved, and the plaintiff appealed.

A. G. Rice, for the appellants.

Cary & White, for the respondents.

By THE COURT.*—MARVIN, J.—The rule, prior to the Code, was well settled that a creditor could not restrain the debtor from disposing of his property until he had exhausted his remedy at law by judgment and execution. It was expressly held that an attaching creditor, under the absent-debtor act, could not move to set aside a judgment alleged to have been fraudulently confessed until trustees were appointed. (*Fort a. Fort*, 9 *Wend.*, 442.) In *Wintringham a. Wintringham* (20 *Johns.*, 296), the court refused to set aside a judgment confessed, or to stay execution, on the ground of fraud, at the instance of a creditor at large, whose debt had not been legally ascertained by judgment. In *Reubens a. Joel* (3 *Kern.*, 488) it was, however, supposed that the Code has so modified this rule as to embrace this case (§ 219).

An injunction-order may be made when it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce

* Present, MARVIN, DAVIS, and GROVER, JJ.

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injury to the plaintiff. Is the case embraced by this clause of the statute? In other words, has this provision of the statute changed the pre-existing rule touching the character of the evidence to be produced to entitle the plaintiff to call in question the acts of the debtor relating to his property? I think it has not. The complaint does not show that the plaintiff is entitled to the relief demanded, as it does not show that he is a judgment-creditor, and until he shows himself a judgment-creditor, he has no right to call in question the judgment which George B. Stone has against Richard B. Stone. It may be that he will not be able to recover a judgment, or if he does, perhaps Richard B. Stone will pay it. In either case, this action will be useless,—unnecessary. The law has clearly settled the question, under what circumstances a plaintiff is entitled to the relief demanded in this case, and it is when he comes as a judgment-creditor, his remedy at law having been exhausted. I think *Reubens v. Joel* is, in principle, in point. The circumstances are not precisely the same. But in that case, the plaintiff was, as alleged, a creditor at large, and complained of an assignment by his debtors to defraud creditors, and sought to set it aside. The act complained of was past, though it is also alleged in the complaint, that a portion of the property assigned was about to be disposed of and sold, and an injunction was demanded as a part of the relief, to restrain the defendant from selling or disposing of the assigned property. Upon a demurrer to the complaint, judgment was for the defendant, and affirmed in the Court of Appeals.

BETTS *a.* BIRDSALL.

New York Superior Court; Special Term, September, 1860.

FORECLOSURE.—WRIT OF ASSISTANCE.

Upon a sale in foreclosure, the court gives possession to the purchaser as against all persons who are parties to the suit, or who came into possession under either of them pending the suit, but does not undertake to remove persons

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who go into possession after the purchaser has received his deed, and conveyed the premises to another.

One who enters over fifteen months after the sale, is not to be deemed as having entered pending the suit, and cannot be removed by a writ of assistance, though he entered under a party to the suit.*

* The purchaser is not entitled to a writ of assistance against a person who, pending the suit, came into possession under one who was in possession at the commencement of the suit, neither person having been made a party. (*Chancery*, 1839, *Van Hook v. Throckmorton*, 8 *Paige*, 88.)

The power of the court to give possession to the purchaser only extends to those persons who are parties to the suit, or persons who have come into possession under, or with assent of those who are parties, subsequent to the commencement of the suit. (*Chancery*, 1843, *Boynton v. Jackway*, 10 *Paige*, 807; *S. C.*, 2 *N. Y. Leg. Obs.*, 248.)

There is no settled practice in the Court of Chancery entitling a subsequent purchaser from the purchaser at a master's sale, as a matter of right, to a writ of assistance. And assistance should be denied, in such case, where there is a strong probability of injustice to the person in possession. (*Chancery*, 1839, *Van Hook v. Throckmorton*, 8 *Paige*, 88.)

The purchaser's grantee who has exhibited, in addition to the sheriff's deed and the order, the purchaser's deed to him, duly acknowledged and recorded, has the same right to a writ of assistance that the purchaser has, unless it should appear that granting the writ would do injustice to the party in possession. [8 *Paige*, 85.] (*Supreme Ct.*, *Sp. T.*, 1853, *N. Y. Life Ins. Co. v. Rand*, 8 *How. Pr.*, 35; affirmed, *Gen. T.*, 1853, 8 *Ib.*, 852; approved in *The Same v. Cutler*, 9 *Ib.*, 407.)

After foreclosure and sale of mortgaged premises, a tenant in possession, who was made a party to the foreclosure, is bound to attorn to the purchaser at the sale, notwithstanding that he holds under an unexpired lease executed by the mortgagors prior to the mortgage, and if he refuses, may be removed by writ of assistance. It is not material that the original lessee, from whom the lease came by assignment to the tenant in possession, was not made a party to the foreclosure. (*Supreme Ct.*, *Sp. T.*, 1853, *Lovett v. German Reformed Church*, 9 *How. Pr.*, 220.)

The power of the court to enforce delivery by a writ of assistance, is superseded by an agreement between the purchaser and the party in possession to convey on terms. (*Chancery*, 1844, *Toll v. Hiller*, 11 *Paige*, 228.)

An equitable claim upon the premises, set up by judgment-creditors of the party in possession, who do not show any claim to the possession as against the purchaser, cannot be considered on motion for a writ of assistance, nor is it a ground for setting aside the writ. (*Supreme Ct.*, *Sp. T.*, 1853, *N. Y. Life Ins. & Trust Co. v. Rand*, 8 *How. Pr.*, 35; affirmed, *Gen. T.*, 1853, 8 *Ib.*, 852.)

Where the judgment or decree contains an order that the party, or a purchaser, be let into possession,—*e. g.* as in the usual judgment in foreclosure,—a motion for a writ of assistance may be made *ex parte*. A defendant in possession must be presumed cognizant of the judgment; all that he can further require, is evidence of the title of the party claiming. If the sheriff's deed and the order confirming the sale is exhibited, and demand of possession made, it is sufficient; and if he

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Motion for a writ of assistance to aid in ousting the defendants, or tenants under them, from certain premises to which the petitioner claimed the right of possession under a judicial sale.

John G. Vose, for the motion.

Nelson Smith, opposed.

BOSWORTH, J.—In this and another action against the same defendants, decree of foreclosure and sale was made as early as the 13th of October, 1858. The premises were sold under the decree on the 6th of June, 1859, and Joseph H. Gray became the purchaser, and received the referee's deed the same day. He now petitions for a writ of assistance to remove Birdsall and one Miller, on the allegation that they are in possession, and refused to give up after demand made, and exhibition of the deed. Miller makes affidavit that John R. Gray conveyed the premises to John G. Vose by deed, dated January 21, 1860. That Miller was not a party to either suit, and entered into possession about the 1st of May, 1860, and not before. That he hired the premises of said C. A. Birdsall for one year, believing her to be the owner, and has paid all of the agreed rent except \$50, which is payable the 1st of May next.

I think the court has no power to grant such a writ to remove Miller. The usual form of a decree is, that any of the parties in this cause who may be in possession of said premises, or any part thereof, and any persons who, since the commencement of this suit, have come into possession under them, or either of them, deliver the possession thereof to the purchaser or purchasers, &c. (3 *Hoffm. Ch.*, 4.) The court gives possession to the purchaser, as against all persons who are parties to the suit,

does not comply, he is not entitled to notice of motion for the writ. *Ib.* (Approved in *The Same a. Cutler*, 9 *Ib.*, 407.)

It seems, that a writ of assistance is in the nature of an execution upon the judgment, and under the Code, may issue without an order. *Ib.*

As to the former practice, which was more circuitous, see *Dick.*, 617; 1 *Bro.*, 375; *S. C.*, 1 *Cox*, 101. *Kershaw a. Thompson* (4 *Johns. Ch.*, 609); *Ludlow a. Lansing* (*Hopk.*, 231); 1825, *Valentine a. Teller* (*Ib.*, 422); *Devaucene a. Devaucene* (1 *Edw.*, 272).

or who came into possession under either of them while the suit is pending. It does not undertake to remove persons who go into possession after the purchaser has received his deed and conveyed the premises to another. Miller also makes affidavit that he has been informed by said Vose, that after said deed to him, he had sent a man and took possession of said premises.

The object of the writ, and the consideration on which it is granted, is that when the court makes a sale, and transfers the title, it will take the possession from a party whose rights have been determined by the suit in which the sale was ordered. A person found in possession when the purchaser obtains his deed, and who went into possession under some one of the parties while the suit was pending, is treated in this respect as if a party.

Although Miller entered under C. A. Birdsall, yet, as he entered over fifteen months after the sale, he cannot be regarded as having entered pending the suit. If he may be removed for the benefit of the present owner, I do not see why any person who enters ten or fifteen years hence under any person who was a party to the suit, may not be removed by a writ of assistance for the benefit of some future grantee of the premises. (*Frelinghuysen a. Colden*, 4 *Craige*, 204; 4 *Johns. Ch.*, 609; 1 *Hop.*, 231.)

The motion must be denied as to Miller, but as he shows no right to be in possession, without costs.

BARNES *a.* WILLETT.

Supreme Court, First District; Special Term, August, 1860.

LIABILITY OF SHERIFF.—ESCAPE OF INSOLVENT DEBTOR.

The provision of 2 Revised Statutes, 437, § 63, giving an action of debt against the sheriff for an escape from final process, is still in substance in force, and the sheriff may be held liable in a similar action under the Code, for the judgment for which the prisoner was committed.

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Barnes *v.* Willett.

In an action founded on the statute, as distinguished from a mere action for damages, the sheriff cannot interpose as a defence the insolvency or poverty of the prisoner.*

Demurrer to answer.

This was an action brought against the defendant, as sheriff of the city and county of New York, to recover the amount of a debt owed to the plaintiffs by one Jacob Cohen, who escaped from the custody of the sheriff. The defendant put in an answer, averring that the escaped debtor had been in some respects wronged by the plaintiffs, and that he was insolvent, and could not have paid the debt, even had he been detained longer.

The plaintiffs demurred to so much of the answer as set up such a defence.

A. Matheros, for plaintiffs.

A. J. Vanderpoel, for defendant.

SUTHERLAND, J.—The statute (2 *Rev. Stat.*, 437, § 63) gave an action of debt against the sheriff for an escape from final process, and declares, that in such action the sheriff shall be answerable for the debt, damages, or sum of money for which the prisoner was committed.

The statute did not take away the common-law remedy for the escape, by action on the case.

Before the Code, if the action for the escape was debt, the plaintiff was limited in his recovery, by the express words of the statute, to the amount of the original judgment.

The statute fixed the extent of the sheriff's liability at the amount of the debt, &c., for which the prisoner was committed. If the action was for debt, the sheriff could not, as a defence, or in mitigation of damages, give evidence of the insolvency or poverty of the prisoner, or of any other circumstance, to show that the plaintiff had lost nothing by the escape.

If the action was an action on the case, the plaintiff recovered the damages sustained by him, which might be more or less

* Compare *Metcalf v. Stryker*, 10 *Ante*, 12, and cases cited.

than the judgment, and in such action the sheriff might give in evidence, circumstances to show that the plaintiff had lost nothing, or in mitigation of damages. (*Rawson a. Dole*, 2 *Johns.*, 454; *Thomas a. Weed*, 14 *Ib.*, 255; *Littlefield a. Brown*, 1 *Wend.*, 398.)

The Code (§ 69) has abolished the form of the action of debt, but it has not abolished or repealed the provision of the statute before referred to, giving to the party at whose suit the prisoner was committed, a right to recover, for his escape from final process, irrespective of the question of the actual loss or damage, the amount of the original judgment or recovery precisely, as a penalty for the carelessness or misconduct of the sheriff. (*Code*, §§ 468, 471; *Hutchinson a. Brand*, 5 *Seld.*, 209.) The Code has not abolished, and could not very well have abolished, the distinction between mesne and final process. These terms have been dropped by the Code, but the distinction, in fact, remains.

In this case, the plaintiffs by their complaint, after alleging the recovery of their judgment for \$6,089.61, the amount of their debt and costs, introduced facts to show their right to issue an execution against the person of Jacob Cohen, one of the judgment-debtors, the issuing of such execution, his arrest, his detention, and subsequent escape, and alleged that thereupon the judgment remaining wholly unpaid, the defendant in this action, sheriff, &c., became indebted to them in the said sum of \$6,089.61, the amount of said judgment, and claim to recover that sum with costs.

Although the Code does not call this an action of debt, and perhaps we are not permitted to call it by that name, yet it is plain that the plaintiffs rest their right to recover the precise amount of their judgment, with the costs of this action, upon the statute; and that we should look upon the action as an action under the statute, for their debt, the judgment, and not as an action at common law to recover damages.

The abolition by the Code of the form of the action of debt, has certainly not taken away the plaintiffs' right to recover for the escape under the statute; and if they have this right, how can they state their cause of action under the Code, otherwise than by stating the facts which show their right to recover under the statute, and by claiming to recover precisely what the statute authorizes them to recover?

Clarke *a.* Clarke.

I think it plain that this action should be looked upon as an action of debt under the statute; and that the defendant, notwithstanding the abolition of the forms of action by the Code, had not a right to set up as a defence thereto the matters set up in the 8th, 9th, and part of the 10th folios of his answer as a second defence.

It is plain too, I think, that the matters set up by the defendant in his answer, as a third defence, constitute no defence.

How can the sheriff, in an action for an escape, protect himself from the consequences of his own wrongful act or neglect, by setting up the wrongs which the escaped prisoner may have suffered at the hands of his judgment-creditors? (Ames *a.* Webbers, 8 *Wend.*, 545; Bacon *a.* Cropsey, 3 *Seld.*, 195.) Even Cohen, the defendant in the original suit, could not have availed himself of the fact that another action was pending in Georgia for the same cause of action, by pleading it in bar. (Walsh *a.* Durkin, 12 *Johns.*, 99; Bowne *a.* Joy, 9 *Ib.*, 221.) Moreover, it would appear that Cohen was surrendered by his bail in Georgia, after his escape from the defendant, and after this action was commenced.

The plaintiffs' demurrers to the matters stated in the answer, by way of second and third defence, must be sustained, and those parts of the answer must be overruled, with costs.

CLARKE *a.* CLARKE.

Supreme Court, First District; Special Term, September, 1860.

DIVORCE.—FRAUDULENT REPRESENTATIONS.

The husband had before marriage to his present wife, who now sought a divorce, represented to her that his former wife was deceased, whereas, in truth, she was living, he having been divorced from her.

Held,—That these representations, even if fraudulent, and though the plaintiff would not have married him if she had known the truth, were not ground for granting her a divorce.

Motion for decree of divorce.

The complaint alleged that the defendant, in commencing his addresses to the plaintiff, stated to her that his former wife was dead. After setting forth the engagement and marriage of the parties, it alleged as follows:

That during all the time of the visits of the defendant to the plaintiff, while paying his addresses to her, the defendant represented to the plaintiff that his said wife was dead, and had died at the time hereinbefore stated, which representations were fully believed by the plaintiff.

That the plaintiff had once refused to marry a divorced husband, and had great repugnance to marrying such a man, and never would have consented to marry such a man.

That her friends and acquaintances knew that she entertained such sentiments; and on information and belief, the plaintiff states that the defendant, at the time he made such representations to the plaintiff, well knew what her views were on that subject, and that she would not have consented to marry him, if she had known that his said wife was living, instead of having died, as he represented; and that said defendant was told by a relative of his own, that he ought to inform the plaintiff that his said wife was living; to which he replied, that he would not so inform the plaintiff, for if he did, the plaintiff would not consent to marry him.

That after said marriage the plaintiff, for the first time, heard that the defendant's said representations were not true, and that his said wife was not dead; that she had informed the defendant what she had heard, and he admitted it was true that his said wife was then living in the city of New York, and stated that he was divorced from her; and on the next day he showed the plaintiff a paper which stated the fact, and the plaintiff has this eighth day of June, 1860; learned from a copy of the decree of the Supreme Court, for the city and county of New York, that said defendant was divorced from his said wife, Anna A. Clarke, on the fourteenth day of June, 1859, and the plaintiff states, on information and belief, that the said Anna A. Clarke has lived in a house of ill fame in the city of New York, from the time of her separation from the defendant.

That the said consent of the plaintiff to marry the defendant was obtained by him from her by fraud and deceit, in falsely representing that his said wife was dead at and before the time

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of obtaining such consent in the manner hereinbefore stated, with the design on the part of said defendant of obtaining such consent from the plaintiff, and that the plaintiff never would have consented to marry or have married the defendant, had he not made such false representations, and had she not fully believed the same to be true.

That when the plaintiff learned the fact that the defendant was a divorced husband, instead of being a widower at the time of her marriage with the defendant, and consenting to marry him, as herein before stated, she informed the defendant that she never could live with him happily or peaceably, and they must separate.

And the plaintiff has since separated herself from the defendant, and she now resides with her friends.

Wherefore the plaintiff demands judgment that said marriage be annulled.

Mr. Cozzens, for the plaintiff.

D. McAdam, for the defendant.

SUTHERLAND, J.—Conceding that the representations of the defendant, as to the death of his first wife, were fraudulently made, and that the plaintiff would not have married him had she known or supposed that his first wife was living, yet it is clear to me that such fraud or deception does not furnish sufficient ground for dissolving the marriage contract between the plaintiff and defendant, and for declaring it to have been void from the beginning. It was not a fraud in or as to a material matter or thing, within the ordinary or legitimate purposes of marriage, and the supposed intention or purposes of parties in contracting marriage. The plaintiff had a fancy that she would never marry a man who had been divorced from his wife. She had a right to indulge this fancy, but it does not follow because she was deceived and induced unknowingly to marry a divorced man, that she should be indulged in such fancy afterwards to the extent of having her marriage judicially declared void. I find neither precedent nor principle for declaring a marriage void for fraud as to or in such a matter or thing. Motion for divorce denied.

 Anonymous.

ANONYMOUS.

Supreme Court, First District ; Special Term, November, 1860.

DIVORCE.—PLEADING.

A complaint in an action for separation from bed and board, which does not specify particularly the nature and circumstances of the complaint relied on, and set forth times and places with reasonable certainty, is bad on demurrer.

A decree declaring a marriage contract void, cannot be granted on a complaint which demands no other relief than a separation from bed and board, unless the defendant has answered.

Demurrer to complaint.

The action was by a husband against his wife for a limited divorce.

Brown, Hall, & Vanderpoel, in support of the demurrer.

David Dudley Field, for the plaintiff.

SUTHERLAND, J.—The plaintiff, by the complaint, demands judgment of separation from bed and board forever. There is, in the complaint, no demands for relief generally, or for any other relief than judgment of separation from bed and board.

It is almost too plain for discussion, that the plaintiff, on the facts stated in the complaint, is not entitled to the judgment of separation from bed and board. He asks for such judgment on the ground that the conduct of the defendant, since his marriage with her, has been such as to render it unsafe and improper for him longer to cohabit with her. I said, in case of *Auld v. Auld*, decided by me at special term, September, 1859, that to authorize a decree of separation for cruel and inhuman treatment, "the proofs should show either actual bodily violence, or such conduct, acts, or threats, on the part of the husband, as might render it unsafe for the wife to continue to cohabit with him ; and that the word *unsafe*, as used in the statute (3 *Rev. Stat.*, 5 ed., 237, 238, § 64), has reference to bodily, personal injury

Anonymous.

or violence, and physical health, as distinguished from mere mental suffering or wounded sensibilities;" citing as authorities for the proposition, Bishop on Mar. and Div. (§ 254, 459); Whispell *v.* Whispell (4 *Barb.*, 217); Mason *v.* Mason (1 *Edw.*, 378).

The proofs to establish the bodily violence or apprehended danger, should at least be as strong when the husband is the complainant as when the wife is the complainant.

Section 65 of the statute (3 *Rev. Stat.*, 238) says, that the complaint in such case shall specify particularly "the nature and circumstances of the complaint" relied on, and "shall set forth times and places with reasonable certainty."

The only allegations in the complaint in this case, at all pertinent to the relief, and the only relief asked for, to wit, a judgment of separation, are the 11th and 16th.

The first is a mere general allegation of improper conduct on the part of the defendant, in the use of coarse and opprobrious epithets towards the plaintiff (without specifying them); in accusing him of crime and of improper intimacy with other women; and in giving way to fits of rage and violent language, ordering the plaintiff's friends to leave the house.

The 16th is a mere general allegation that the plaintiff is constantly in danger from defendant and her son, Charles; that "they are striving to deprive him of his property, and to do him bodily harm;" without alleging any facts or circumstances to show that the plaintiff had reasonable grounds to apprehend bodily harm from the defendant, or the defendant and her son, or that it would be unsafe and improper for him longer to cohabit with her.

The statute requires these facts and circumstances to be stated in the complaint, with reasonable certainty as to times and places.

It is, therefore, no answer to the demurrer to say, that the Code has provided a mode for making the complaint more definite and certain. It is matter of special statutory regulation; and therefore I do not think that the general provision of the Code affects the question. See remarks of Judge Parker in Whispell *v.* Whispell (4 *Barb.*, 217).

It is plain, then, I think, that the complaint does not contain facts sufficient, if proved, to authorize the judgment of separation asked for.

Anonymous.

But it is insisted on the part of the plaintiff that, conceding the complaint does not contain facts sufficient to authorize the judgment of separation asked for, yet that it does state facts to authorize a decree of the nullity of the marriage contract, and that the plaintiff is entitled to such decree in this action.

The complaint alleges that at the time of the plaintiff's marriage to the defendant, she represented to him that she was a widow; that she had been married twice; that her husbands were both dead. The complaint then alleges that the plaintiff, after his marriage to defendant, was informed and believes that such representations were untrue, and made to deceive and inveigle the plaintiff into a marriage with her; that she was married three times before plaintiff's marriage with her: first, to one Jefferds; secondly, to one Hamilton Morrison; lastly, to one Russell; and that at the time of plaintiff's marriage with her, her second husband, Hamilton Morrison, was and is still living in the State of Ohio.

Assuming that these allegations, if proved, would have authorized a decree declaring the marriage contract with the plaintiff void, had the complaint asked for such decree, or even for general or other relief, either upon the ground of fraud, or upon the ground that she had a husband living at the time of her marriage to the plaintiff;* yet, as the complaint asks for a judgment of separation only, without a prayer even for other relief generally, the question is, whether the fact that the complaint contains these last allegations, is an answer to the defendant's demurrer, that the complaint does not contain facts sufficient to constitute a cause of action.

I think not. The defendant has not answered, but demurred.

Section 275 of the Code says: "The relief granted to the plaintiff, *if there be no answer*, cannot exceed that which he shall have demanded in his complaint; but, *in any other case*, the court may grant him any relief consistent with the case made by the complainant, and embraced within the issue."

Suppose I should give judgment for the plaintiff on this demurrer, with leave for the defendant to answer in twenty days, and the defendant should not avail herself of the permission to answer, and should never put in an answer, this section

* Compare *Clarke v. Clarke*, *Ante*, 228.

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of the Code would appear to prohibit the plaintiff from having a decree of nullity on this complaint, because the relief asked for by it is limited to a judgment of separation; and I have shown that he would not be entitled to a judgment of separation, because the facts stated in the complaint are not sufficient to authorize such judgment.

It would appear to follow that the defendant must have judgment on her demurrer; but the plaintiff may amend his complaint in twenty days, on payment of costs.

HARPER *v.* CHAMBERLAIN.

New York Superior Court; Special Term, October, 1860.

PLEADING.—COMPLAINT AGAINST DIRECTORS OF CORPORATION.—
DEMURRER.

A demurrer which specifies various grounds of objection to the sufficiency of the allegations of the complaint, without stating any one of the grounds specified in section 144 of the Code, is insufficient.

Form of a sufficient complaint against directors of a corporation for fraudulent representations as to the capital and condition of the company.

Demurrer to complaint.

The plaintiffs brought this suit against the directors of the New York City Fire Insurance Company, to hold them personally liable for the amount due on a policy of insurance issued by the company to the plaintiffs upon their printing and publishing establishment. The complaint charged that the directors of the company published false representations of the amount of capital possessed by the company, in consequence of which the plaintiffs were induced to insure with the company.

The allegations were as follows:

I. That these plaintiffs are, and at all the various times here-

inafter mentioned were, parties in business, as publishers, in the city of New York, under the firm name of Harper & Brothers.

II. That, at some time during the year 1852, not precisely known to these plaintiffs, a company, named or known as the "New York City Insurance Company," was organized in this State for the purpose, among other things, of making insurance upon vessels, freights, goods, wares, merchandise, specie, jewels, profits, commissions, bank-notes, bills of exchange, and other evidences of debt, bottomry and respondentia interests, and to make all and every insurance appertaining to or connected with marine risks, and risks of transportation and navigation; and to make insurance on dwelling-houses, stores, and all kinds of buildings, and upon household furniture, merchandise, and other property, against loss or damage by fire, and the risks of navigation and transportation.

III. That said company was pretended to be organized under the provisions of an act of the Legislature of this State, passed April 10, 1849, entitled "An act to provide for the Incorporation of Insurance Companies."

IV. That, by the pretended charter of said company, it was provided that the business of said company should be conducted upon the plan of mutual insurance; and it was also provided that the capital of said company should be three hundred thousand dollars; and it was also provided that the directors of said company might unite a cash capital of not less than fifty, nor more than two hundred thousand dollars, as an additional security to the insured, above the fund of three hundred thousand dollars, also mentioned in said charter; and it was also provided that the principal office of the company should be located in the city of New York.

V. That upon or after the organization of said company, and prior to March, 1853, the defendants, and each of them, were chosen trustees or directors of said company, and accepted and entered upon office as such; and defendants, and each of them, were, during March, 1853, and before and afterwards, trustees or directors of said company.

VI. That the defendants, as such directors or trustees of said company, fraudulently, and with the intent to induce these plaintiffs and others to make insurances with the said company,

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and pay them premiums for such insurances, did, at many times prior to, and during the first week of March, 1853, falsely publish, advertise, aver, and represent to the public at large, and to these plaintiffs, and to the confidential advisers of these plaintiffs, that the capital of said company was five hundred thousand dollars; and that said company was possessed of a paid-up capital of five hundred thousand dollars; and that said company was solvent, and responsible, and able to pay any losses to the amount of five hundred thousand dollars; and they did, fraudulently, and with like intent, prepare, and publish, and exhibit to these plaintiffs, and the confidential advisers of these plaintiffs, a form of policy containing a statement that the capital of said company was five hundred thousand dollars; whereas the fact was, and these defendants well knew, that said company had never raised, and never were possessed of a capital of five hundred thousand dollars in any form; and that they had never raised, and never were possessed of any cash capital exceeding thirty thousand dollars; and that the said company never did raise a capital in any form of the value of even one hundred and fifty thousand dollars.

VII. That these plaintiffs, confiding in the representations aforesaid made to these plaintiffs by the defendants, and confiding in the general reputation of said company, produced by the representations aforesaid made by defendants to the public at large, and being further advised thereto by the confidential advisers of these plaintiffs, who were misled by the representations aforesaid made to them by the defendants, and believing, in consequence of the premises, that the said company was possessed of an actual capital of five hundred thousand dollars, paid in or secured in some of the ways prescribed by the provisions of the act of 1849, hereinbefore referred to, were induced to enter into a contract with said company for an insurance, as hereinafter stated, upon the material, stock, fixtures, and other property of these plaintiffs, used by them in their business, for one year from the 7th day of March, 1853; and these plaintiffs, confiding and believing as aforesaid, were induced by the premises to pay, and on the 7th or 8th day of March, 1853, did pay, to the said company, and to the defendants as directors or trustees thereof, the sum of one hundred and fifty dollars as premium upon such insurance; and were induced by

the premises to make said insurance with said company, instead of making it with other companies, of which there then were a great number, solvent, responsible, and willing to make such insurance on the property described in said policy.

VIII. That the said company did, on the 7th day of March, 1853, execute and deliver to these plaintiffs their policy of insurance, a true copy whereof is hereto annexed, marked Exhibit A, whereby the said company, in consideration of one hundred and fifty dollars, to them paid by these plaintiffs, the receipt whereof was thereby acknowledged, did insure these plaintiffs against loss or damage by fire, to the amount of ten thousand dollars, on their printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine and machinery, contained in the premises in the city of New York, described in said policy.

IX. That, on the 10th day of December, 1853, the printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine and machinery, described in said policy of insurance, were, by misfortune, and without fraud or evil practice, damaged, consumed, and lost by fire, not happening by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power; and that, by the said fire, the said insured sustained loss and damage, in and by the consuming, damage, loss, and destruction of said property, to the amount of three hundred and twenty-one thousand nine hundred and ninety-five dollars, estimating the said loss at the true and actual value of the property at the time of the happening of said fire.

X. That, at the time of said fire, there were other insurances effected by these plaintiffs, as permitted by said policy, on the same property, to the aggregate amount of one hundred and eighty-two thousand dollars only.

XI. That, at the time of making said insurance, and from then until the fire above mentioned, these plaintiffs had an interest in the said property insured as the owners thereof, and they were, and now are, the lawful owners and holders of the claim arising upon said policy and loss against the said company.

XII. That these plaintiffs duly fulfilled all the conditions of said policy of insurance upon their part, and did forthwith,

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after the said loss and damage by fire, give notice thereof to the said company, and did, as soon thereafter as possible, and on the 17th day of December, 1853, deliver to said company a particular statement of said loss and damage, subscribed by James Harper, one of these plaintiffs, and duly verified by his oath; and these plaintiffs, on the 1st day of June, 1854, and at divers other times, duly demanded from said company payment of the sum of ten thousand dollars and interest, due to them upon said policy by reason of said loss.

XIII. That said company have hitherto always neglected and refused to pay said loss; and these plaintiffs brought an action in the Superior Court of the city of New York against said company, to recover upon said policy for their loss sustained as aforesaid, and were put to great expense therein, and on the 20th day of July, 1857, recovered judgment therein for the full amount of their claim, and interest, and costs, to wit, \$11,278.76, and caused execution to be issued thereon, which execution was, on the 24th day of September, 1857, returned wholly unsatisfied.

XIV. That, by reason of the premises, these defendants have sustained great damage.

Wherefore these plaintiffs demand judgment for twenty thousand dollars damages.

The demurrer was as follows:

First. That said complaint doth not allege any precise time when said New York City Insurance Company was organized. And that the same is a matter of public record, and ought to be precisely stated.

Second. That the plaintiffs allege ignorance of the time of said organization; when, first, as it is a matter of public record, they are by law deemed to have notice, and absolutely to know the same; and, secondly, they, as insured parties, are members of the corporation or company, and deemed in law to know all the facts.

Third. The plaintiffs allege that they dealt with the said company as a corporation. They are thereby estopped from denying that it is a corporation, and was such when they dealt with it.

Fourth. The laws of this State did not at the time, in the

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year 1852, stated in said complaint, authorize the organization of any insurance corporation or company for the purposes stated in Division No. 1 of the said complaint; and a company so organized was unlawful, and could make no valid contract.

Fifth. The act of April 10, 1849, referred to in said complaint, does not authorize, and did not at any time authorize, the formation of an insurance company for the purposes named in Division No. 1 of said complaint, nor with the powers specified in the alleged charter of said company; and that such alleged organization was therefore illegal and absolutely void, and could not contract with the plaintiffs; and any pretended contract, and especially the pretended contract of insurance specified in said complaint, was absolutely void, and of no effect.

Sixth. That the pretended representations and fraud alleged in the sixth and seventh divisions of said complaint, are not sufficiently alleged in said complaint to charge the defendants; and are not specified with such certainty and particularity as the law requires to form the gist of an action for damages, and put the defendants upon their defence.

Seventh. That said complaint doth not specifically allege any amount of damage sustained by the plaintiffs by reason of said representations alleged as fraudulent.

Eighth. That the plaintiffs do not shew in and by said complaint that they have exhausted their legal remedies at law against said pretended company, and its property, upon the judgment they allege they have obtained, and have thereby failed to collect the same of said company; as, by the very nature of its property, upon their showing, it may have ample means of payment which they might secure, and have applied to their judgment by the appointment of a receiver, in either of two ways provided by law for that special purpose.

Ninth. That said complaint doth not allege that the said pretended judgment is still subsisting, and valid, and unreversed; or that no appeal is depending thereon.

Levi S. Chatfield, in support of the demurrer.

Benjamin Vaughan Abbott, opposed.

BONNEY, J.—The defendant Hobbie has demurred to the

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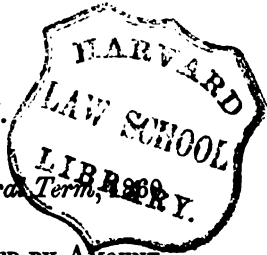
complaint in this action, and alleged nine grounds of demurrer, neither of which is composed in the grounds of demurrer specified in section 144 of the Code. The supposed defect in the complaint, which the pleader probably intended to allege, is, that it does not state facts sufficient to constitute a cause of action. But this ground of demurrer is not so taken or stated as to be available to the defendant. And if properly stated, in my opinion the demurrer could not be sustained. The complaint states, in substance, that the defendants, being directors or trustees of the New York City Insurance Company, pretended to be organized for the transaction of business on the plan of mutual insurance, under the act of April 10, 1849, fraudulently made false representations to the plaintiffs and others in relation to the capital and condition of the company, with intent to induce the plaintiffs to effect insurance with the company, and pay to it premiums therefor. That plaintiffs, induced by such representations, did make a contract of insurance with said company, and pay the company the sum of \$150 premium therefor; and that by reason, and in consequence of these facts, plaintiffs have been injured, and sustained damages as stated in the complaint. In my judgment, the statements of the complaint are sufficient to maintain an action. (*Pontifex v. Begnold*, 3 *Mann & Grang.*, 63; *Cross v. Sackett*, 6 *Abbotts' Pr.*, 247.)

The amount of damages which the plaintiff can recover is not now a subject for consideration.

Judgment must be entered for plaintiffs on the demurrer, with leave to defendants to answer in twenty days, on payment of costs.

 Marsh a. Benson.

MARSH a. BENSON.

Supreme Court, Sixth District; General Term, 1884.

JURISDICTION OF SUPREME COURT LIMITED BY AMOUNT.

The provision of 2 Revised Statutes, 173, § 87,—directing that the Court of Chancery must dismiss every suit concerning property where the matter in dispute, exclusive of costs, does not exceed the value of one hundred dollars,—is not abrogated, but by the judiciary act was applied to the Supreme Court, and has the effect of depriving that court of equitable jurisdiction in such cases. *

* The principles which governed the Court of Chancery in the application of this statute, are illustrated in the following cases :

The provision of the Revised Statutes was only intended to increase the amount or value of matters in controversy, of which the Court of Chancery should take cognizance, from £10 to a sum which should exceed \$100. The principles upon which the court formerly proceeded in relation to this smaller sum must now be applied to the increased amount. (*Chancery*, 1834, *Smets a. Williams*, 4 *Paige*, 364.)

Before the statute, the court held that they would not entertain a suit by an infant, for interest on a legacy directed by the will to be applied to her education, where the amount due was less than fifty dollars. The Common Pleas had jurisdiction in such a case. (*Chancery*, 1821, *Fullerton a. Jackson*, 5 *Johns. Ch.*, 276; and see *Moore a. Lytle*, 4 *Ib.*, 183; *Smets a. Williams*, 4 *Paige*, 364.) Nor would the court entertain a bill relative to an amount less than £10. (*Chancery*, 1824, *Vredenberg a. Johnson*, *Hopk.*, 112.) Nor take jurisdiction of a bill to foreclose a mortgage for \$500 not yet due, on default of \$35 interest. Though the court has power, it is not bound to order a sale in such case. (*Chancery*, 1824, *Mitchell a. Tighe*, *Hopk.*, 119; and see *Smets a. Williams*, 4 *Paige*, 364.)

In the statute, the words "exclusive of costs," refer to the costs in the suit in chancery merely. (*Chancery*, 1841, *Spear a. Given*, 9 *Paige*, 362.)

The decision of the court as to the dismissal of the bill, does not depend upon what is actually disputed by the defendant, nor does it depend upon the final adjudication of the court as to what the complainant has a right to recover. But it must depend upon the nature and value of the claim which is actually made by complainant. If the amount claimed on the judgment by a creditor's bill is less than the amount prescribed in the statute, or if the value of the property and effects of defendant, as claimed by complainant, does not exceed \$100, the Court of Chancery will not take jurisdiction of the case. (*Chancery*, 1834, *Smets a. Williams*, 4 *Paige*, 364.)

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Appeal from an order dismissing a complaint.

This action was brought to charge the separate estate of a married woman with the payment of a debt alleged to have been contracted by her on the faith or for the benefit of it. The court at special term dismissed the complaint, on the ground that the amount of the alleged debt was less than \$100. From the judgment thus entered, plaintiff appealed to the general term. A similar case between different parties came before the court at the same time, and in the same manner.

BY THE COURT.*—PARKER, J.—The amount claimed is less than one hundred dollars.

At special term the complaint was dismissed for want of

A mere bill of discovery in aid of a suit at law, is not a suit concerning property; and such bill must be entertained, where it seeks discovery of usury, though the amount in dispute, exclusive of costs, does not exceed \$100. (*V. Chan. Ct.*, 1832, *Goldey a. Becker*, 1 *Edw.*, 271; approved in *Schroeppel a. Redfield*, 5 *Paige*, 245.)

A mere bill of discovery in aid of a defence to a suit at law,—*e. g.*, a suit at law to recover on a gaming contract,—is not a suit concerning property. (*Chancery*, 1835, *Schroeppel a. Redfield*, 5 *Paige*, 245.)

Suits to set aside a release of a right of action at law, are suits concerning property within the provisions of the Revised Statutes relating to the jurisdiction of Chancery; and the complaint must show that a right of action existed, and that the damages in controversy are at least \$100. (*Chancery*, 1845, *Winsor a. Orcutt*, 11 *Paige*, 578.)

The court has jurisdiction to foreclose a mortgage given to secure unliquidated damages, if the amount claimed to be due is more than one hundred dollars; and if the amount due should turn out to be less than one hundred dollars, its jurisdiction is not divested. (*Chancery*, 1846, *Ferguson a. Kimball*, 8 *Barb. Ch.*, 616.)

Where the bill stated that the defendant was insolvent and out of the State, and that the mortgage did not contain any power of sale,—*Held*, that in such a case the court has jurisdiction, if the mortgaged premises are worth more than \$100, although there is less than \$100 due; since there is no other remedy, and there would otherwise be a failure of justice. (*Chancery*, 1842, *Barton a. Farbore*, 2 *Ch. Sent.*, 59.)

If the injury, present and prospective,—*e. g.*, from the diversion of a water-course,—does not exceed \$100,—that is to say, \$6 or \$7 annually,—a bill to restrain the diversion must be dismissed, with costs. (*Chancery* 1837, *Smith a. Adams*, 6 *Paige*, 435.)

That a creditor's bill, founded upon a judgment in a court of record, for less than \$100, and a justice's judgment, the execution upon which does not run against land, for \$33, should be dismissed. (*Coe a. Whitbeck*, 11 *Paige*, 42.)

* Present, PARKER, MASON, CAMPBELL, and BALOOM, JJ.

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jurisdiction on that ground, and the only question raised on the appeal from the judgment entered at special term is, whether this court is bound, as the Court of Chancery would have been before the adoption of the present Constitution, to dismiss the suit, pursuant to section 37, of article 2, title 2, chapter 1, part 3 of the Revised Statutes. (2 *Rev. Stat.*, 173, § 37.)

Notwithstanding it is declared in section 69 of the Code, that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished," it is undeniable that we still have actions at law and suits in equity; and this distinction is constantly recognized by this court and the Court of Appeals, and the Code itself has not failed to make provisions founded upon such distinction. Indeed, the Constitution recognizes and affirms the distinction as one existing and to remain, where it gives to the Supreme Court, in article 6, section 3, "general jurisdiction in law and equity;" and where, in section 5 of the same article, it provides that "the Legislature shall have the same powers to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed;" and when, in section 10 of article 6, it provides that "the testimony in equity cases shall be taken in like manner as in cases at law. (See *Reubens a. Joel*, 13 *N. Y.* (3 *Kern.*), 488.) The effect of these provisions of the Constitution, as I understand them, was, so far as proceedings in equity are concerned, to transfer to the Supreme Court the general jurisdiction and powers then existing in the Court of Chancery, and to continue to the Legislature the same powers in reference to such jurisdiction and proceedings as they then had. This court, from the time of its organization, became vested with such general jurisdiction and powers of the former Court of Chancery, precisely as that court had possessed them up to that time, it being declared in section 17 of article 1 of the Constitution, that "such acts of the Legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same; but all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution are hereby abrogated." (*Wilcox a. Wilcox*, 14 *N. Y.* (4 *Kern.*), 575, 579.)

At the time the Constitution went into effect, the provisions

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of the statute above referred to, excluding from the jurisdiction of the Court of Chancery "every suit concerning property, where the matter in dispute, exclusive of costs, does not exceed the value of one hundred dollars," was in force.

But if any legislation were necessary to modify the general jurisdiction of the court, in accordance with that provision of the statute, it was had in the judiciary act of 1847, whereby it was enacted that "the Supreme Court, organized by this act, shall possess the same powers, and exercise the same jurisdiction as is now possessed and exercised by the present Supreme Court and Court of Chancery," &c.; "and all laws relating to the present Supreme Court and Court of Chancery, or any court held by any vice-chancellor, and the jurisdiction, powers, and duties of said courts, the proceedings therein, and the officers thereof, their powers and duties, shall be applicable to the Supreme Court organized by this act, the powers and duties thereof, the proceedings therein, and the officers thereof, their powers and duties, so far as the same can be so applied, and are consistent with the Constitution and the provisions of this act." (*Laws of 1847*, 323, § 16.) This is a re-enactment of the provision of the statute above referred to. Does section 69 of the Code repeal, or in any manner affect, the jurisdictional provisions of that act?

The only effect of that section of the Code is, as I think, to abolish the previously existing distinction between actions at law and suits in equity, so far as the forms of action are concerned, and to reduce all actions to the same mode of proceeding.

The language of the section is entirely consistent with this construction. Taking it all together, its object is plain: to reduce all actions to one form, denominated a "civil action." The first and last clauses are correlatives; the first doing away with an existing condition, the last providing for a new condition in its place. When, therefore, it provides that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished," and follows with the provision: "and there shall be, in this State, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action;" it manifestly in-

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tended to substitute one formal method of proceeding in court for the two others previously existing in equity and at law. A "suit" or "action" is defined to be "the formal method of pursuing and recovering one's right in a court of justice." (*Worcester's Dictionary*.) The distinction between actions at law and suits in equity, then, which is abolished, is the distinction between their "formal methods of pursuing and recovering" rights in court. This is the extent of the general object of the Code in this regard, as shown in its preamble, in which it is declared to be expedient that "the distinction between legal and equitable remedies should no longer continue, and that a uniform course of proceeding in all cases should be established," the uniform course of proceeding substituted for the existing legal and equitable remedies.

This is all the codifiers contemplated, as fully appears from their report to the Legislature. They say: "In our remarks upon this section, we shall consider separately the two propositions which it involves. The first is the abolition of the distinction between actions at law and suits in equity." After adverting to the rise and establishment of the Court of Chancery, and the difference of judicial opinion as to the precise boundary which separated the powers of law and equity which prevailed, and to the causes which led the convention to adopt the provision of the Constitution abolishing the Court of Chancery, and declaring that "there shall be a Supreme Court having general jurisdiction in law and equity,"—they say, "a reference to the debates of the body, will show that this result was effected by the conviction which was entertained of the injustice of subjecting a party whose rights were involved, to the uncertain chances in the selection of the proper forum by which they were to be determined; and it is not a little singular that this important change in the judicial establishment of the State, owes its origin mainly to the fact that this injustice was the result rather of the modes of proceeding than of the rules of determination adopted by the several legal and equitable tribunals." (69.) Again, they say, "It is no part of our purpose to present the principle of a union of law and equity jurisdiction upon a broader basis than that which has reference to their forms of proceeding. It is enough for us to know that the fundamental law has united these functions in

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one tribunal ; and in recommending to the Legislature a system of practice by which those functions may be conveniently examined, it is only necessary that we should take care not to encroach upon substantial rights, keeping in view the distinction between rights, on the one hand, and the means of their ascertainment and enforcement on the other ; the only question is, whether a mode of proceeding common to all controversies, whether known as legal or equitable, can be safely and conveniently prescribed." (74.)

All that the codifiers had in view, as it seems, was the prescribing of a safe and convenient mode of proceeding common to all civil controversies, whether legal or equitable ; or in the language of the act of the Legislature under which they were appointed, and by which their duties are prescribed, providing "for a uniform course of proceeding in all cases, whether of legal or equitable cognizance" (*Laws of 1847*, ch. 59, § 8) ; and such, I think, for the reasons above appearing, was the intention of the Legislature in adopting that section.

I have said that we still have actions at law and suits in equity. A suit appealing to the equitable powers of the court, and asking for equitable relief, is as properly now a suit in equity as ever. The mode of conducting such a suit in court, is the same as the mode of conducting a suit asking legal relief, or a suit at law, except in those respects in which the Code has provided for a distinction, as in sections 253 and 254. The first of these sections, having reference to actions at law (except so far as it provides for actions for divorce), secures a jury trial, as required by the Constitution ; the second, having reference to suits in equity, in which jury trials have not, in the language of the Constitution, "been heretofore used" (art. 1, § 2), provides for a trial by the court, as permitted by that article.

The Code provides for further distinctions in sections 274 and 275, as to the relief granted ; and sections 304 and 306, as to the costs.

This distinction between legal and equitable actions is recognized at every circuit in the trial of causes, pursuant to section 257 of the Code ; equity cases, or issues of fact, to be tried by the court, being postponed on the calendar to actions at law, or issues of fact, to be tried by a jury.

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So it is constantly recognized by this court and by the Court of Appeals.

An action for mere equitable relief will not be sustained where the plaintiff has a complete remedy at law. (See *Mills v. Black*, 30 *Barb.*, 549; *Wilson v. Forsyth*, 24 *Ib.*, 105; *Mace v. Trustees of the Village of Newburgh*, 15 *How. Pr.*, 161; *Bouton v. City Bank of Brooklyn*, 15 *Barb.*, 375; *Crippen v. Hudson*, 13 *N. Y. (3 Kern.)*, 161; *Heywood v. City of Buffalo*, 14 *N. Y. (4 Kern.)*, 534.) In the latter case, the court says: "It is still the law that a party who brings an equitable action must maintain it upon some equitable ground; and if his cause of action is of a legal and not an equitable nature, he must bring a legal action, or pursue a legal remedy. When a matter is clearly or *prima facie* one of legal cognizance, a party must, in order to maintain an equitable action upon it, state clearly facts sufficient to entitle him to equitable relief, and to show that a perfect remedy cannot be obtained at law."

The distinction between actions at law and suits in equity, and the distinct jurisdictions in regard to them are also recognized in *Sage v. Mosher* (28 *Barb.*, 288); *Reubens v. Joel* (13 *N. Y. (3 Kern.)*, 488); *Voorhees v. Childs' Executor* (17 *N. Y. (3 Smith)*, 354).

In this discussion I have not been unmindful of the cases which seem to hold a different doctrine, such as *Giles v. Lyon* (4 *Comst.*, 599); *Dobson v. Pearce* (12 *N. Y. (2 Kern.)*, 156); *Crary v. Goodman* (*Ib.*, 266); *Phillips v. Gorham* (17 *N. Y. (3 Smith)*, 270). In *Giles v. Lyon*, the Court of Appeals decided that section 47 of the amended Code of 1849, authorizing the Supreme Court to transfer "equity cases" to the Superior Court of the city of New York, applied only to suits in equity commenced under the previous system, and did not authorize the transfer of an action commenced under the Code, although such action was strictly equitable according to former distinctions. The construction of the phrase "equity cases," in that section, was the question to be decided, and the decision was as above.

Judge Gardiner, in giving the opinion of the court, says: "The accumulation of causes of this character in the former Court of Chancery, and the embarrassed condition of the new courts, particularly those in the first district, in consequence of

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their transfer to them, was notorious; and one great object in creating a new branch of the Superior Court, was to relieve the Supreme Court of that district from the burden of investigating causes which were not properly their own. Section 47 was designed as a remedy for the difficulty, and framed accordingly." This is a sufficient reason for the decision; indeed, such being the object for which section 47 was framed, the construction of the phrase arrived at was inevitable.

Judge Gardiner, it is true, in his opinion discusses the effect of section 69 of the Code, and uses language which might, taken by itself, imply a different understanding of it from the one above given, and yet from the whole of his discussion, as bearing on the question to be decided, I do not understand his opinion to be adverse to the position herein taken. His argument, drawn from section 69, is that, inasmuch as that section "ordains a new name for all proceedings to be thereafter instituted for the redress of private grievances," to wit, a "civil action," the old nomenclature of "actions at law" and "equity cases" being done away, it would be repugnant to construe the term "equity cases," in section 47, as applying to actions commenced under the new system.

In *Dobson v. Pearce*, and *Crary v. Goodman*, the court held that equitable defences may be set up to actions at law. This is expressly authorized by the Code in section 150, which is a sufficient reason for the decision; and although when these actions were commenced, prior to 1852, that section did not contain the express authority which it was made to contain by the amendment of that year; still in *Dobson v. Pearce*, Judge Allen, in giving the opinion of the court, seems to give the same effect to the section before as since the amendment, quoting it as it now is, and applying it to the case. *Crary v. Goodman* was decided expressly upon the authority of *Dobson v. Pearce*.

In *Phillips v. Gorham* it was decided that in an action to recover the possession of land, the plaintiff may attack a deed, under which the defendant claims, upon both legal and equitable grounds. That case came within the provisions of section 167, as expressly declared by Judge Johnson, who gave the opinion of the court.

Although in these cases the discussions contained in the opinions delivered might lead to a different conclusion from

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the one at which I have arrived, in reference to the question of an existing distinction between legal and equitable actions, still I do not understand that they, or any of them, have decided that question adversely to the view I have taken of it; and I do not see any conflict between the Code and the section of the Revised Statutes above referred to. The jurisdiction of the court is not reached by section 69 of the Code, but remains as it stood when the Code was enacted, subject to the aforesaid provision of the Revised Statutes, which prohibits the court from taking jurisdiction in equity in any suit concerning property, where the matter in dispute, exclusive of costs, does not exceed the value of \$100.

Upon this precise question there has been some conflict in the decisions of this court in different districts.

Judge Marvin held, at special term, that the provision of the Revised Statutes above cited is still in force, and that this court is limited in its jurisdiction by that provision. (*Shepard v. Walker*, 7 *How. Pr.*, 46.)

In *Mallory v. Norton* (21 *Barb.*, 424), the court, at general term in the fourth district, held that an action in the nature of a suit in equity might be maintained against a party who had procured an execution to be issued on a justice's judgment against the body of the defendant therein, the judgment having in fact been paid, for the purpose of perpetually enjoining such party from enforcing the collection of such judgment and execution, notwithstanding the amount of the judgment was less than \$100. Although Mr. Justice C. L. Allen, in giving the opinion of the court, discussed the question of the court's jurisdiction, under the provision of the Revised Statutes above cited, and came to the conclusion that the said 37th section was in effect repealed; yet it seems very clear that section 37 has no application to that case, for the reason that the relief asked for was not merely that the judgment be decreed satisfied, but that the party should be perpetually enjoined from enforcing the execution which was against the body of the plaintiff in that action. The suit was not one "concerning property" merely, to which kind of suits alone that section applies. (*Schroepel v. Redfield*, 5 *Paige*, 245.) The court, therefore, was not limited in its jurisdiction by that section, and very properly entertained jurisdiction of the case.

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In *Cobine v. St. John* (12 *How. Pr.*, 333), my brother, Balcom, has come to a different conclusion from the one to which I have come upon this question, and his dissenting opinion in this case maintains the position then taken by him.

It is said that unless this court will take jurisdiction of this action, the plaintiffs are remediless, and that our judicial system affords no means for the collection of debts of less than \$100 against married women. It is true, but no more so now than it has always been, at least since the enactment of section 37 above referred to, that no mere equitable demand of less than \$100 can be enforced in our courts. If this is an anomaly, it is one which the Legislature alone can correct.

I understand that this court, in this district, has repeatedly held, at general term, that it cannot take cognizance of such actions, and I see no reason for departing from the rule held in those cases.

In my opinion the decision at special term was right, and the judgment appealed from should be affirmed, with costs.

MASON and CAMPBELL, JJ., concurred.

BALCOM, J. (dissenting).—A justice of the peace has not jurisdiction to try the cause of action set out in the complaint (*Coon v. Brook*, 21 *Barb.*, 546); and the only remedy the plaintiffs have to collect their demand against Mrs. Willard is in equity. The debt was created by her subsequent to her marriage, for the benefit of her separate estate, and her obligations incurred for that purpose must be enforced, if at all, as a charge on such estate, and not as a personal liability. (*Rogers v. Ludlow*, 3 *Sandf. Ch.*, 104.) It is clear that if the complaint in this action was properly dismissed, the plaintiffs are remediless, and the anomaly exists in our judicial system that prevents the collection of all debts less than \$100, against married women; at least such was the case prior to the passage of the act of 1860, "concerning the rights and liabilities of husband and wife." (*Laws of 1860*, 157.) What change, if any, that act has made, it is unnecessary now to ascertain, for this action was tried in 1859, and must be determined by the law as it then existed.

I should not have discussed the question in *Cobine v. St. John* (12 *How. Pr.*, 333), respecting the right to maintain, in

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this court, actions like this, wherein the claim is less than \$100, if I had known when I decided that case, as I now do, that this court at general term in this district had passed on the question before I came to the bench, and held that equitable actions brought in this court concerning property, where the plaintiff's demand, exclusive of costs, does not exceed \$100 in value, should be dismissed with costs to the defendants, precisely as the Court of Chancery was required to dismiss such actions prior to the adoption of the Constitution of 1846; but as my opinion in *Cobine v. St. John* has been published (though incorrectly in some respects), and the decision made at the general term, which I have mentioned, has not been reported, and this court, at a general term in the fourth district, has held upon this question, in *Mallory v. Norton* (21 *Barb.*, 424), the same that I did in *Cobine v. St. John*, I think we should regard the question an open one, and determine it as we are now convinced it ought to be settled.

The statute in force when the existing Constitution was adopted, read as follows: "The Court of Chancery shall dismiss every suit concerning property, where the matter in dispute, exclusive of costs, does not exceed the value of \$100, with costs to the defendant." (2 *Rev. Stat.*, 1 ed., 173, § 37.) This section has been omitted in the 4th and 5th editions of the Revised Statutes, and, as I suppose, because the eminent lawyers who supervised their publication were of the opinion that it was abrogated. It restricted the jurisdiction of the Court of Chancery to suits concerning property, where the matter in dispute, exclusive of costs, exceeded the value of \$100. In other words, that court was forbidden to proceed with any suit concerning property, if its value, exclusive of costs, was only \$100, or was less than that sum. But I think this restriction was removed by section 3, of article 6, of the Constitution, which declares "there shall be a Supreme Court having general jurisdiction in law and equity."

The continuation of the powers as they had before existed in the Legislature, to alter and regulate the jurisdiction and proceedings in law and equity (*Con.*, art. 6, § 5), has no bearing upon the question, whether the conferring of general jurisdiction, in equity, upon the Supreme Court, did not abrogate the section of the Revised Statutes above quoted.

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If it could be said that the judiciary act of 1847, by implication, revived the above-mentioned section of the Revised Statutes, I think the Code has removed such implication. The Code has abolished, so far as was deemed practicable, all distinction between actions at law and suits in equity, and the forms of all such actions and suits as they existed prior to its enactment. (*Code*, § 69.) By section 306, costs in all suits in equity "may be allowed, or not, in the discretion of the court." This is inconsistent with the idea that, as matter of law, the court must dismiss a certain class of such suits, with costs to the defendant; and the spirit of the entire Code is opposed to the position that the jurisdiction of this court, of suits in equity, concerning property, is affected in the least by the value of the matter in dispute.

For the foregoing reasons, I am of the opinion the jurisdiction of this court in equity is general, as conferred by the Constitution.

If this conclusion is correct, this court has jurisdiction of this action, and should have heard and determined it upon the merits; and the judgment in it, dismissing the complaint, with costs, was erroneous, and should be reversed, and a new trial granted, costs to abide the event.

Judgment affirmed.

 DEMILT v. LEONARD.

Supreme Court, Sixth District; General Term, 1860.

**INSANE PERSONS.—JUDGMENTS OVERREACHED BY INQUISITION.—
MOTION TO SET ASIDE JUDGMENT.**

An action may be maintained on behalf of a lunatic to set aside a judgment which is overruled by an inquisition of lunacy; or the court may, on motion, set aside such judgment.

An inquisition of lunacy is presumptive evidence even against strangers to the proceeding.

Subsequent to the recovery of judgment against plaintiff,—which was recovered for costs on proving a former settlement of the matters in controversy,—an in-

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quisition of lunacy was had concerning the plaintiff, and she was declared thereby to have been incapable of managing her affairs for a period which included the time of the alleged settlement.

Held, that the court should grant a motion to set aside the judgment, the judgment having been, moreover at the same term reversed on appeal.

Appeal from order denying motion to set aside judgment.

The plaintiff in this action failed and suffered judgment against her for costs, on the ground of a former settlement of the matters in controversy. After the judgment was recovered, a commission of lunacy was issued against her, and she was by the inquisition declared to have been insane for a long period, which overreached the time of the alleged settlement. A committee of her person and estate was thereupon appointed, and he moved the court at special term to vacate the judgment. The motion was denied, and he appealed. Meanwhile the judgment itself had been also appealed from.

E. E. Ferry, for the appellant.

A. Becker, for the respondent.

BY THE COURT.*—BALCOM, J.—The judgment was rendered against the plaintiff before the issuing of the commission to inquire in regard to her lunacy; but the finding of the jury that the plaintiff had been of unsound mind, and incapable of taking care of herself or her affairs without interval for about nine years, is presumptive evidence that she was a lunatic when the judgment was obtained. (2 *Paige*, 422; 6 *Wend.*, 497.) The case of *Osterhout v. Shoemaker* (3 *Hill*, 513), shows that the inquisition is evidence, even as against strangers to the proceeding, who had no opportunity to offer or cross-examine witnesses. They must overcome the presumption created by the inquisition, by evidence on their part.

When an application was made to the chancellor to set aside some judgments recovered against a lunatic in actions at law, he used this language: "I doubt whether it is right to interfere in this summary way to deprive the plaintiffs of their legal liens,

* Present, MASON, BALCOM, CAMPBELL, and PARKER, JJ.

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although the recovery of the judgments, and the whole proceedings in those suits are overreached by the finding of the jury, under the commission of lunacy. As the court of law had jurisdiction of the cases, if the judgments are either irregular or erroneous, on the ground that the suits were prosecuted against a defendant who was legally incompetent to make any defence thereto, the remedy appears to be by a summary application to the court in which the judgments were obtained, or by a writ of error. Or if there is no remedy at law, and the judgments have been improperly recovered against a lunatic, for pretended claims, which were not justly due, it may be a proper case for the committee to proceed by a bill in equity, to be relieved against such judgments." (Matter of Hopper, 5 *Paige*, 491.) The Supreme Court refused, under our former system of practice, to set aside a judgment obtained by default against a person who had been found by inquisition to be an habitual drunkard. The court said: "We do not think the proceedings irregular. The committee should apply to the Court of Chancery." (Clarke *a.* Dunham, 4 *Den.*, 262, where Robertson *a.* Lain, 19 *Wend.*, 649, is cited.) This court held, in Sternberg *a.* Schoolcraft (2 *Barb.*, 153), that a judgment recovered in a court of law against a person who has been found a lunatic or an habitual drunkard, and whose person and property have been placed in the custody of a committee, will not, for that reason, be held void. The same doctrine was asserted in Crippen *a.* Culver (13 *Barb.*, 424). But such judgments are not conclusive upon the committee of the lunatic. They may be examined and their fairness ascertained. The equitable rights of the lunatic will be protected. (See 2 *Paige*, 153; 14 *Barb.*, 488.)

It is clear that the fairness of a judgment obtained against a lunatic may be attacked by an equitable action instituted by his committee. It may be modified or annulled in such an action. And as the Court of Chancery has been abolished, and general jurisdiction in law and equity has been conferred on this court (*Const.*, art. 6, § 3), I can see no well-grounded objection to this court setting aside judgments against lunatics, on motions made by their committees. Difficult questions of fact, arising on such motions, may be referred to a referee to determine. (*Code*, § 271, subd. 3; 18 *N. Y.* (4 *Smith*), 484.)

In this case the plaintiff was beaten by reason of a settle-

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ment, which the inquisition, *prima facie*, shows was made with her when she was a lunatic. And it was made under circumstances that satisfy me the judge should have set aside the judgment and ordered a new trial, or directed a reference to ascertain the fairness of the settlement and the sanity of the plaintiff at the time she made it. I am, therefore, of the opinion the order appealed from should be reversed, but without costs to either party, as the practice in such cases has not been settled since the existing organization of our courts. I also think no other disposition of the motion should now be made, for the reason that we have, at this term, reversed the judgment against the plaintiff, and granted a new trial, costs to abide the event, on an appeal from the judgment itself, for an error committed on the trial.

Decision accordingly.

TAYLOR v. THE MAYOR, &c., OF NEW YORK.

Supreme Court, First District; Special Term, September, 1860.

NEGLECT TO FOLIO PAPERS.—RETURNING PAPERS.

Where papers are to be returned for irregularity, if there is no attorney's name on them, they are to be returned to the party. If the party is a municipal corporation, having a counsel chosen under a statute, they should be returned to him.

Motion by defendants for an attachment, and also for a writ of restitution.

John W. Edmonds, for the plaintiff, objected to the motion being heard, on the ground that the papers served were not folioed as required by rule 20 of the rules of this court.

Wm. Curtis Noyes, *John McKeon*, and *Greene C. Bronson*, in support of the motion, urged, that if the opposite party had intended to rely on this objection, he should have returned the

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papers within twenty-four hours, to the party serving them, in compliance with the provisions of the same rule.

Counsel opposed, replied that they would have returned the papers, but did not know to whom they should have been returned, as no name of any attorney or counsel for the defendants, the moving party, appeared anywhere on the papers served.

INGRAHAM, J.—I suppose the same rule applies to this as to an ordinary suit. When there is no attorney's name on the papers, then the party is the person to whom the papers are to be returned. Here the party defendant are the Corporation of New York, and you have knowledge from the statute, who their counsel and attorney is. The papers should have been returned to him or to the attorney, or the person acting on the part of the city government. When a technical objection of this kind is made and relied upon, both parties are required to pay strict observance to what the rule is. It was just as much your duty to return, as it was theirs to serve, and I think that you have failed in what was required of you to enable you to take advantage of this objection, and that the motion can be heard notwithstanding.

The motion then proceeded.

ACKERMAN *v.* ACKERMAN.

New York Common Pleas ; Special Term, November, 1860.

ATTORNEY'S LIEN.—EXECUTION.

Plaintiff's attorney has a lien on the judgment for his counsel-fee, over and above the taxable costs ; due notice of such lien having been given to the defendant. And he may issue execution on such judgment for the amount of such fee, although a satisfaction-piece has been executed by plaintiff, and delivered to defendant, and filed in the clerk's office.

Motion to set aside execution.

Judgment was entered against defendant by default for \$4,583.62. Subsequently plaintiff's attorney gave defendant notice in writing, that he claimed a lien on the judgment for his counsel-fee of \$100, over and above the costs. After service of that notice, plaintiff and defendant, without the knowledge of the plaintiff's attorney, settled the suit, and plaintiff gave defendant a satisfaction-piece, which was duly filed in the clerk's office.

Defendant then paid plaintiff's attorney his taxable costs, \$17.73.

Plaintiff's attorney not knowing that the satisfaction-piece had been filed, issued execution for \$72.27, being balance of his fees after crediting defendant with amount received in another matter.

The defendant now moved to set aside the execution, upon the ground that satisfaction was entered before the same was issued, and that the plaintiff and defendant had settled.

W. J. Kane, for the motion.

A. P. Whitehead, opposed.—I. Plaintiff's attorney has a lien on the judgment for his fees, besides costs, and after notice to defendant of such lien, defendant settles at his peril. (*Ward v. Wordsworth*, 1 *E. D. Smith*, 598; *Hall v. Ayer*, 9 *Abbotts' Pr.*, 220; *Rooney v. Second Avenue Railroad Co.*, 18 *N. Y.*, 368.)

II. The satisfaction-piece was filed after notice of the lien, and was in fraud of plaintiff's attorney. All fraudulent acts are void. The satisfaction-piece is void as to plaintiff's attorney.

BRADY, J.—Upon reflection I am satisfied that the satisfaction-piece was filed by the defendant with full knowledge of the lien of the plaintiff's attorney, and was in contravention of his rights, and, therefore, as to him, a fraud.

Having arrived at this conclusion, the motion to set aside the execution must be denied, unless the defendant pays to the attorney of the plaintiff \$72.27, being the balance due under the lien, within twenty days after service of the order to be entered hereon. No costs to either party on this motion, but sheriff's fees to be paid by defendant.

Tindal *a.* Jones.

TINDAL *a.* JONES.*Supreme Court, Second District; General Term, May, 1860.*

COSTS.—EXECUTORS AND ADMINISTRATORS.

Where executors or administrators are substituted for a deceased defendant in a pending action, they are not entitled to presentation of the demand, under the provisions of 2 Revised Statutes, 88-90,—relating to referring claims against estates of deceased persons,—and section 41 of that statute does not prevent plaintiff from recovering costs against them if he continues the action and recovers judgment.

Special application to the court for leave to enter judgment in such case is not necessary.

Appeal from an order denying motion to set aside judgment.

The action was originally commenced against the defendant intestate to recover an indebtedness on contract. After issue joined, the original defendant died, and the present defendant was appointed his administratrix. Plaintiff, instead of presenting his claim to the administratrix, applied for and obtained leave to continue the action against her by supplemental complaint. He proceeded therein to judgment. On entering judgment, the clerk, against defendant's objection, allowed him costs, and taxed the same.

At special term defendant's motion to set aside the judgment was denied, and she appealed.

William Skinner and *R. Cockran*, for the appellant.

Mr. Larkin, for the respondent.

BY THE COURT.*—EMOTT, J.—There have been various and contradictory decisions upon the question presented by this appeal. In *McCann a. Bradley* (15 *How. Pr.*, 79), the general

* Present, EMOTT, LOTT, and BROWN, JJ.

Tindal v. Jones.

term in the first district held that an action commenced against a defendant in his lifetime, and revived against his personal representatives after his death, was within section 41, of title 3, chapter 6, part 2 of the Revised Statutes (2 *Rev. Stat.*, 90, § 41); and costs could not be recovered unless the claim had been presented to the personal representatives, or a reference refused, which is in effect to say that in such an action they could not be recovered at all. In *Haight v. Hayt*, which is not reported on this point, the general term in this district had previously made the same ruling. This case went to the Court of Appeals, but it was upon the merits, and by an appeal by the defendants, and the question of the plaintiffs' right to costs was not presented to that court. The plaintiffs, however, were allowed their costs of both the appeals in the same action,—that from the circuit to the general term, and that from this court to the Court of Appeals. This was understood to have been permitted upon the ground that an appeal was in the nature of a new action, and that the executors, having appealed from the judgment against them, ceased to be defendants, or persons against whom an action was brought, in the sense of the statute.* On the other hand, the general term of the sixth district, in *Lemen v. Wood* (16 *How. Pr.*, 285); and the full bench of the Superior Court, in *Benedict v. Caffé* (3 *Duer*, 669), took a directly opposite view of the question. In the latter case, in particular, Mr. Justice Slosson discusses the question at large in a well-considered opinion. In this state of the authorities we feel at liberty to treat the question as open, and to reconsider the decision in this district, especially as it has never been reported, and is sustained by no opinion.

The provisions of the Revised Statutes form a system which is complete in itself in regard to the settlement of estates, and the collection of demands against them. The section in question is part of that system, and is intended to give to executors and administrators notice of a demand made upon them, and an opportunity to admit it and agree to its payment in the

* As to this view of an appeal, consult *Enos v. Thomas* (5 *How. Pr.*, 359); *Johnson v. Yeomans* (8 *Ib.*, 140); *Seely v. Pritchard* (12 *N. Y. Leg. Obs.*, 245); *Gormly v. McIntosh* (22 *Barb.*, 271); *Harriott v. New Jersey Railroad Co.* (8 *Abbotts' Pr.*, 284); *D'Ivernois v. Leavitt* (*Ib.*, 59); and see *People v. Judges of Suffolk* (24 *Wend.*, 249).

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course of administration, or to try its validity in a cheap and easy mode, if it depend altogether upon questions of fact; but in cases like the present, the intestate has in his lifetime the opportunity to elect whether he would pay or resist the claim. He elects to defend, puts the party making the claim to a suit, and may put him to the trouble and expense of a litigation in all stages, perhaps including several trials, down to its final result. He dies, it may be, just before that result is reached, and the effect is said to be that the plaintiff must lose his right to the costs already incurred, and go on at his own expense for all the proceedings in the suit, past and to come; or relinquish his proceedings, pay his costs already incurred, and then exhibit his claim, like every other creditor, *de novo* under the statute. That might be the case if the suit finally abated, and could not be revived, although even then it would be highly unjust. But since the action does not abate, but is continued, it is not easy to see how the plaintiff is to be deprived by the change of parties of his right to costs, which are one of the incidents of the suit, and depend upon no other contingency than final success. I exclude of course from this remark the effect of the action of the Legislature while the suit is pending. The effect of the death of the original defendant, the partial abatement in consequence, and subsequent revivor of the action, is only to substitute new parties. The personal representatives are put in the place of the deceased, just as the assignors of a bankrupt are substituted for him. The interest is changed, but the cause of action and the action itself survive. There is no abatement in strictness and reality, but merely a temporary defect of parties in consequence of the death of the defendant and the transmission of his interest. In analogous cases in the former practice of the Court of Chancery, the action was not so suspended, even before it had been revived against the personal representatives, but that some proceedings could be had in the mean time, as a motion to dismiss for want of prosecution, or an application for a receiver and the like. The representatives of a deceased defendant come into his shoes in all respects. They become defendants to a suit against him, not an action which has been brought against them; and the action must proceed against them as it would have done against him. If, in the final event, it turns out that the plaintiff recovers a judgment, which would entitle him to

costs had the original defendant survived, he has the same right against his legal representatives and successors, and section 317 of the Code directs how that judgment shall be entered and enforced.

Nor is it necessary to make an application to the court for leave to enter a judgment for the costs in such a case. Such an application is only necessary when the award or refusal of costs rests in the power or discretion of the court, or at least depends upon something else than a positive direction of statute. In cases where the action is brought against executors or administrators, no costs are recoverable unless the plaintiff has, before bringing the action, complied with the conditions of the statute, and this must be shown to the court outside the record; but when the administrator is substituted for the deceased in a pending action, as in this case, the court would have had no more to pass upon in such an application than if a similar application were made in the case of a living defendant.

The plaintiff's judgment was regular, and the order refusing to set it aside must be affirmed, but considering the conflicting character of the decisions, without costs.

BROWN, J.—Dissented.

THE PEOPLE *on rel.* MITCHELL *a.* HAWS.

Supreme Court, First District ; Special Term, June, 1860.

COMPENSATION OF JUDGES.—CONSTITUTIONAL LAW.

The act of April, 1852,—*Laws of 1852, 592, § 7*,—is unconstitutional so far as it assumes to authorize the Board of Supervisors to raise by tax, and pay an additional compensation to the justices of the first judicial district, in office at the time of its passage.

Demurrer to the return to an alternative mandamus.

Defendant is the comptroller of the city of New York, and

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the relator sued out a writ of mandamus to procure payment of additional compensation which he claimed as justice of the Supreme Court, under the act of 1852.

The facts are fully stated in the opinion.

B. D. Silliman, for the relator.

H. H. Anderson, for the comptroller.

SUTHERLAND, J.—The question in this case, is raised by the relator's demurrer to the return of the comptroller to an alternative writ of mandamus, requiring him to draw and sign his warrant on the chamberlain of the city, for the payment to the relator of \$8,250, alleged to have been audited, and allowed, and to be due to him, as a justice of the Supreme Court, or to show cause, &c.

The relator was elected a justice of the Supreme Court prior to the year 1852; and during that year, and subsequently, until the 1st day of January, 1858 (on which day the term for which he was elected expired), was a justice of the Supreme Court, resident in the first judicial district.

The compensation allowed to justices of the Supreme Court by a general law at the time of the relator's election, was \$2,500 per annum, and this compensation was paid to, and received by the relator, during his term of office, and up to the 1st day of January, 1858.

On the 16th of April, 1852, the Legislature passed an act to the effect, that the Board of Supervisors of the city and county of New York, might raise by tax and pay to the justices of the Supreme Court, resident in the first judicial district, such additional annual compensation as they might deem proper.

The Board of Supervisors thereupon passed a resolution giving an additional annual compensation of \$1,500 to the said justices.

In the tax-levy for the city and county of New York, provided for by act of April 19, 1859, among sundry sums of money, the said Board of Supervisors were authorized to raise by tax in the usual way, for arrearages of 1858, the sum of \$41,189, which sum was made up in part of the sum of \$8,250,

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so alleged to be due, and payable to the relator as extra compensation under the said resolution of the Board of Supervisors, and of other sums alleged to be due and payable to Justices Edmonds, Edwards, and Roosevelt, under the same resolution, and as like extra compensation; and when the said alternative mandamus in this case was granted, the taxes so authorized by the act of April 19, 1859, were mostly collected and paid.

The Board of Supervisors, on the 16th day of August, 1859, passed a resolution, auditing and allowing the bill of the relator for \$8,250, for such additional annual compensation as justice of the Supreme Court of the first judicial district up to 1st January, 1858, and directing the comptroller to pay the relator the sum so allowed, as such "additional annual compensation."

Demand was made by the relator on the comptroller in March, 1860, that he should pay the amount so allowed to the relator; and also that he should draw and sign his warrant on the chamberlain for the payment of that sum; but the comptroller refused, until the right of the relator to the money should be judicially determined.

To an alternative writ of mandamus, reciting substantially these facts, the comptroller makes a return admitting all the matters of fact set forth in the writ, but insisting, that the act of the Legislature of the 16th April, 1852, allowing the Board of Supervisors to raise by tax, and pay such additional annual compensation, so far as it authorized, or was intended to authorize the raising and payment of such additional compensation to the relator and other justices resident in the first judicial district, elected prior to the passage of the act, and in office when it passed, and during the terms for which they had been severally elected, was, and is unconstitutional; and that the same, and the said resolutions of the Board of Supervisors, were wholly without force and inoperative as to the justices last mentioned, and did not and do not authorize the payment of any amount to either of the said justices.

To this return, the relator demurred.

The section of the Constitution containing the provision referred to, and insisted upon by the comptroller, as prohibiting the passage of the act in question, so far as it applied, or was

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intended to apply to justices elected prior to the passage of the act, and in office at the time of its passage, is as follows :

"The judges of the Court of Appeals, and justices of the Supreme Court, shall severally receive at stated times for their services a compensation to be established by law, which shall not be increased or diminished during their continuance in office."

The question then presented by the demurrer is, whether the act authorizing the payment of the additional compensation is constitutional, as to the relator and other justices of the first judicial district in office when the act was passed.

This was the only question argued before me, and is the only question in the case ; for the resolution of the Board of Supervisors allowing the additional compensation, on the relator's own case, must be assumed to have been passed by the authority of the statute. It has not even been claimed on the part of the relator, that the Board of Supervisors, independent of the statute, was authorized to pass either of the resolutions above referred to.

The only question then, that I shall consider or decide, is, whether the act is constitutional, so far as it authorizes, or was intended to authorize, the Board of Supervisors to raise by tax and pay an additional compensation to the relator and other justices of the first judicial district, in office at the time of its passage.

Constitutional questions demand careful consideration. It is a grave matter to pronounce a law unconstitutional, but when the purpose or intent of a constitutional provision has been clearly ascertained, it is the plain duty of the court to see that such provision is neither defeated or evaded.

Why then, was the constitutional provision, that the compensation to be established by law for judges of the Court of Appeals and justices of the Supreme Court, "shall not be increased or diminished during their continuance in office," inserted in the Constitution ? What was, and is, its purpose or intent ?

On the part of the relator it is insisted that this provision was intended merely to protect the treasury of the State ; and as the additional compensation to the justices of the first judicial district, by the act and resolutions in question, is not to be paid

out of the treasury of the State, but is to be paid by the authorities of the city and county of New York, directly, and without going into the treasury of the State, out of moneys raised by tax on property taxable in that city and county alone, it is further insisted, that the payment of such additional compensation, even to the justices in office at the passage of the act, by force and authority of the act, would not at all interfere with the proposed object or intention of the constitutional provision.

If this provision was intended merely to protect the treasury of the State, as the act calls for nothing from the treasury of the State, I do not see how its constitutionality could be questioned. But was the provision intended merely to protect the State treasury? In terms it is a restriction on the Legislature. Was it intended merely to protect the treasury of the State from the Legislature? Had the words of the provision been "shall not be increased," &c., and not as they are, "shall not be increased or diminished," &c., it appears to me that you could not say, with any propriety of language, that it was intended to protect the treasury. An increase of salaries would have called for, and we must assume would have been followed by, a corresponding increase of taxation; and thus as much additional money would have flowed into the treasury as flowed out of it, and the treasury would have been kept even. I do not see how even an increase of the salaries of any State officer or officers can be considered an attack on the treasury of the State, although I can see how it might be, on the taxpayers. But I do not see how it can be said that this provision of the Constitution was intended to protect the taxpayers; for it not only forbids an increase, but also a diminution of the compensation "to be established by law, during," &c., and it would be absurd to say, that the diminution was forbidden with intent to protect either the taxpayers or the treasury. Besides, the increase or diminution is only forbidden "during their continuance in office." These words, I think, show conclusively, that it was not the main object and purpose of the provision to protect either the treasury or the taxpayer. If that was its object and purpose, why did it not absolutely forbid an increase of the "compensation to be established by law," instead of limiting the prohibition to the continuance in office.

There are provisions in the Constitution, put there to protect

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the State treasury; such as section 8, of article 7, which forbids paying money out of the treasury except under legislative appropriation. There are numerous other provisions to protect the taxpayer; such as section 9 of the same article, which forbids the loaning of the credit of the State to individuals, associations, &c.; sections 10, 11, and 12, of the same article, limiting the power to contract debts; and sections 13 and 14 regulating the power to impose taxes, &c. But it is quite clear to me, that the provision of the Constitution in question, was not put in the Constitution either to protect the State treasury or the taxpayer, although incidentally and to a certain extent it may protect both.

A careful examination of the question has convinced me, contrary to the impression left upon my mind by its argument in this case, that the main object and purpose of putting this provision in the Constitution was to secure the independence and integrity of the judges and justices during their continuance in office—to protect them from the Legislature, not the State treasury, or the taxpayer; so that they could and would firmly discharge their duties, without the fear of a reduction, or the favor of an increase of their salaries, by the Legislature, during their continuance in office.

This is shown, I think, not only by the fact, that the provision in terms, applies only to judges and justices after their election to office, and during their continuance in office, but is most consistent with the history and general frame of these written Constitutions of government.

The history of the written Constitutions, which resulted from the Revolution, shows, that it was the intention in framing them to make the executive, legislative, and judicial powers, or departments of government, not only independent of each other, but checks upon each other. These Constitutions were not only grants of power, but regulations of granted power. Besides numerous express restrictions, and a qualified veto provided by them as checks upon the legislative power, it necessarily followed, from the very frame of these Constitutions, that the judicial power was the ultimate check upon both the legislative and executive powers; for these Constitutions were to be construed; and from the very nature of the duty, it became the province and duty of the judges to construe them; and be-

hind the construction of the ultimate court having jurisdiction of the question and of the parties, there lies only obedience or revolution.

Our State Constitution of 1846, seems to have been framed in a spirit of increased distrust of the legislative power. The express restrictions on the Legislature in it, are much more numerous than in either of the previous Constitutions. Besides these express restrictions, there are certain limitations of the legislative power granted, necessarily to be implied from the purposes and object of civil government, and from the fact that the legislative power is granted.

Now, as an act of the Legislature not authorized by the Constitution, if it escapes the executive veto, if questioned, has yet to pass the judicial scrutiny, is it extraordinary that the same Constitution which contains these increased express restrictions on the Legislature, and makes the judges and justices elective for short terms, should provide that the salaries of the judges and justices should neither be "increased nor diminished during their continuance in office," so that they could be neither starved or induced into a pliant adoption of a construction by the Legislature of the constitutional restrictions and limitations of its own power?

These considerations lead me to the conclusion that the main purpose and object of this constitutional prohibition of an increased compensation during the continuance in office only, and of course only after a judge's or justice's election, was intended to prevent the judges of the Court of Appeals, and the justices of the Supreme Court, from being placed under obligations to the Legislature.

There is nothing in the Constitution preventing judges or justices from receiving presents or gifts from individuals, or corporations, private or municipal. If the supervisors of the city and county of New York, or the Common Council of the city of New York, had undertaken by resolution or ordinance, without and independent of any act or authority of the Legislature, to pay the justices of the Supreme Court of the first judicial district an increased annual compensation, certainly this constitutional provision would have had nothing whatever to do with the question of the legality or validity of such resolution or ordinance, even as to the justices then in office; for it is plain

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that the constitutional provision is, and was intended to be, a mere restriction on the Legislature only. But it appears from the resolution of the Board of Supervisors of the 16th of August, 1859, auditing and allowing the claims of the relator and others for additional compensation, that such claims were presented, and audited, and allowed, and directed to be paid, in pursuance of the act of the Legislature, and of the resolution of the Board of Supervisors of December 27, 1852; and the relator's whole case and right, as presented in the alternative writ of mandamus, and by the argument of his counsel before me, is founded and proceeds upon the theory, that the resolution of December 27, 1852, was passed by authority of the act of the Legislature; and the comptroller assuming this, as he had a right to assume on the relator's own case, in his return sets up and insists upon the unconstitutionality of the act, as to the relator and other justices elected prior to, and in office at the time of its passage.

It is plain, then, that I am not permitted to speculate on the question, whether the Board of Supervisors by virtue of general authority, or under general laws, had authority to pass the resolutions; or whether the city of New York, as a Corporation, under its charter or otherwise, without and independent of any special act or authority of the Legislature would have had a right to raise and pay the additional compensation; but that in deciding the question of the constitutionality, I must assume that the resolutions of the Board of Supervisors were passed by force and authority of the act in question; and if the increased compensation claimed by the relator is paid to him, that it must be paid to him by force and authority of the act.

This being so, it follows, if the views above presented as to the purpose and object of the constitutional provision relied upon by the comptroller are correct, that the act is unconstitutional, and the resolutions passed, or purporting to have been passed by its authority void, as to the relator and other justices of the first judicial district, in office when the act was passed. If the constitutional prohibition of an increased compensation "during their continuance in office," was intended to prevent the justices from being placed under obligations to the Legislature, or to a Legislature, during their terms of office; and the increased compensation claimed by the relator and others in office when the act was passed is claimed by them, and if paid,

is to be paid under and by authority of the act; does it not follow that the act is unconstitutional as to the relator and such other justices? What difference does it make to the relator, whether his increased compensation is paid to him by the comptroller or chamberlain of the city of New York, or the comptroller or treasurer of the State. If he is paid by the comptroller or chamberlain of the city of New York, by force and authority of the act, he is just as much indebted to the Legislature for his additional pay as though he received it from the comptroller or treasurer of the State.

It is clear, then, that the act in question, so far as it was intended to authorize an additional compensation to the relator and other justices of the first judicial district, in office when passed, was within the mischief intended to be remedied or prevented by the constitutional provision, if I am right in my view of its purpose and object.

If as was suggested on the argument, and as the history of the legislation as to judges' salaries in this State prior to the Constitution of 1846 might lead one to suppose, the constitutional prohibition of increased compensation was intended not only to make the judges and justices independent of the Legislature, but to relieve the Legislature from their solicitations for an increase of salaries, it as clearly follows from the views that have been presented, that the act in question was and is within the mischiefs intended to be remedied or prevented by the constitutional prohibition, so far as the act was intended to apply to, and benefit justices in office at the time of its passage, and during their continuance in office.

It has been suggested if the act in question, so far as it authorizes increased compensation to the justices of the first judicial district then in office is unconstitutional, that the authority given by another section of the act to pay justices from other districts assigned to perform judicial services in the first judicial district under the act, is, and must be also unconstitutional.

I think not, even as to justices of other districts then in office. The services to be performed by justices from other districts are extra services, out of their districts, and over and above such as they were elected to perform in their districts. The \$8 per day allowed them by the Board of Supervisors under the act for the

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services, places them under no obligations either to the Legislature or the city—for the extra pay they do extra work. But if the increased compensation is paid to the relator and other justices of the first judicial district elected prior to the act, it is to be paid to them for the services which they were elected to perform, and which they would have performed had the act authorizing the additional compensation never been passed.

My conclusion is that the comptroller must have judgment on the demurrer, with costs.

WOLFE *a.* THE SUPERVISORS OF RICHMOND.

Supreme Court, First District; Special Term, 1860.

COMPLAINT AGAINST THE COUNTY FOR INJURY DONE BY MOB.—
PLEADING PASSAGE OF STATUTE.—CONSTITUTIONAL LAW.

In an action to recover damages for injuries to person or property, it is not necessary to aver in the complaint that the acts complained of did not occur through the negligence or carelessness of the plaintiff. The same rule applies to actions against a city or county, under the act of 1855, to recover for injuries done by a mob.

In pleading a statute which is of such a nature that a three-fifths vote is required to pass it, it is not necessary to allege that such a vote was had. An averment that the statute was passed is sufficient.

The object of the provision of art. 10, § 1, of the Constitution,—that the county shall not be answerable for acts of the sheriff,—is merely that for any thing done by the sheriff in the discharge of his official duties, the county should not be liable; and the act of 1855, which makes counties liable for injuries committed by a mob, is not repugnant to the Constitution.

The liability imposed by that act is irrespective of any inability or neglect on the part of the sheriff.

Demurrer to complaint.

The facts are stated in the opinion.

INGRAHAM, J.—The plaintiff claims to recover damages for property destroyed by a mob in the county of Richmond. The

complainant avers that he was the owner of goods and chattels in the town of Westfield; that a riot was there committed by certain persons, and the dwelling-house in which such goods and chattels then were, was set on fire by a mob, and the property of the plaintiff was thereby destroyed. The complaint further avers that the plaintiff was not apprised of any threat or attempt to destroy or injure his property.

The defendants demur to the complaint, for the cause that it appears on the face of the complaint that the same does not state facts sufficient to constitute a cause of action.

This action is brought under the statute of 1855 (*Laws of 1855*, 800, ch. 428), which provides that any city or county shall be liable to an action by, or in behalf of the party whose property was thus destroyed or injured for the damages sustained by reason thereof.

It is not necessary for the plaintiff to aver in the complaint that he did not aid in, assist, or permit the destruction of the property. He avers that the act was done by the mob, and there is nothing in the statute which requires any other averment. It is never necessary in a complaint for injury to the person or to property, to aver that the act did not occur through the negligence or carelessness of the plaintiff. That may be shown by the defendant as matter of defence upon the trial; but it is not necessary to be averred in the complaint, any more than it is necessary upon the trial for the plaintiff, in making his case, to prove in the first instance that he was not at fault, either through carelessness or negligence. The defendant may prove it, and if any proof of that character is offered, the plaintiff then, and not before, is required to show that he was free from such fault.

The objection that the act of 1855 was not passed by a three-fifths vote, cannot be taken on this demurrer. It does not appear on the face of the complaint that any such objection exists. The complaint avers that the statute was passed by the Legislature. In the absence of any proof on that subject, we must presume that it was properly passed.

The only objection remaining is to the constitutionality of the act of 1855. This does not involve any question as to the power and authority, or as to the liability and duty of the sheriff. That he has power to suppress riots, and for that pur-

pose to use the whole force of the county, cannot be doubted. But the action is not founded on any injury arising from the act of the sheriff. It is the reverse. It rests entirely on the acts of those engaged in the riot, whether they were committed in consequence of the inability or neglect of the proper authorities to maintain the peace by preventing or suppressing riots. Upon the same principle, acts of negligence by corporate authorities are the grounds of action by individuals whose property is damaged by, or in consequence of such negligence, when, if the injury had arisen from the acts themselves, properly performed, no damage could be recovered. The cases of *Mayor, &c. a. Furze* (3 *Hill*, 612); *Mayor, &c. a. Lloyd* (1 *Seld.*, 369); *Hutson a. Mayor* (5 *Ib.*, 163), and others cited in those cases, are in point to show that such actions may be maintained for negligence causing damage. And *Wilson a. Mayor, &c.* (1 *Den.*, 595), is important to show that by acts legally done, although injurious, no liability exists.

The statute (1 *Rev. Stat.*, 384) provides for bringing actions against a county in the name of the Board of Supervisors. I do not understand the defendants as objecting to the mode in which the action is brought; but to the power of the Legislature to impose upon the county this liability under the act of 1855.

I suppose it must be conceded that the Legislature has ample power to declare any act legal or illegal, and to impose liability for damages to a party injured, in all cases in which there is no restriction contained in the fundamental law which limits their powers. If the Constitution does not affix a limit, by prescribing cases in which they may not act, they have full authority to legislate in regard thereto.

The defendants, however, contend that such prohibition is contained in section 1, of article 10 of the Constitution, which says: "The county shall never be made answerable for the acts of the sheriff." The true construction of this clause is, that for any thing done by the sheriff in the discharge of his official duties, the county should not be liable. If it had been averred that the sheriff, while attempting to preserve the peace, illegally took possession of, and destroyed the plaintiff's property, this provision would apply, and would protect the county from liability. In the present case, however, I do not understand this

action to be founded on any claim for damages arising out of the acts of the sheriff. The statute of 1855 does not place the responsibility either on the act of the sheriff, nor, as the defendant supposes, on the neglect of the sheriff to act. The only ground of liability is the existence of a mob or riot in the county, and the destruction of property by such mob.

The propriety of charging the people of counties with the consequences of riots within the county is apparent. It is not to punish them for the acts or negligence of the sheriff, but for their own conduct in permitting riots to take place. The sheriff could do nothing without the aid of the people. It becomes a matter of interest to them to prevent and suppress riots, if the statute makes them responsible for the damages proceeding therefrom; and although the sheriff is the officer to whom the authority is specially committed, yet there are other officers in the county who, with him, have authority to arrest all offenders against the public peace. It is no more intended to make the county liable for the acts of the sheriff, than for other officers.

The provision in the statute which requires notice to be given to the sheriff in the county, requires the like notice to be given to the mayor of a city; but no part of the statute contemplates the liability as limited by the neglect of the sheriff to discharge his duties.

The inability of the sheriff to do what is necessary to suppress a riot, is no more a defence to this action than his neglect would be a ground for it. The liability is irrespective of either, and is imposed for the destruction of property by the riot, whether the sheriff has done all in his power or not to prevent it.

This notice is not for the purpose of fixing any liability on the sheriff. The party whose property is in danger is required to avoid every thing which might aid, sanction, or permit the injury to be done; and where he knows of the intended injury, he is required to use all reasonable diligence to prevent it; and as an evidence that he has used such diligence, he is required to show that he has applied to the sheriff of the county for protection. The notice to the sheriff, so far as the plaintiff's rights are involved, is intended for no other purpose.

The plaintiff is entitled to judgment on the demurrer, with leave to defendants to answer, on payment of costs.

LAMOREE'S CASE.

Supreme Court, Second District ; General Term, May, 1860.

LUNACY.—SELECTION AND APPOINTMENT OF COMMITTEE.

The filing and confirmation of an inquisition on a writ *de lunatico inquirendo*, should not be set aside for mere irregularity, where there is no room whatever for doubt of the lunacy of the person concerned.

The appointment of a stranger as committee of a lunatic without request of the relatives and next of kin of the lunatic, and without a reference, and without notice to persons prospectively interested in the estate, is not authorized by the practice of the court.

It is no objection to the appointment of a person who is a resident of the State, and within its jurisdiction, that he is not a resident of the county, in the County Court of which the proceedings are had.

Appeal from order of the County Court denying a motion to set aside an inquisition of lunacy and an order appointing a committee.

Jerusha Lamoree was, by proceedings on a writ *de lunatico inquirendo*, in the County Court of Dutchess county, declared a lunatic, and subsequently, on the application of the petitioner, a committee was appointed of her person and estate. On behalf of parties interested, a motion was made before the County Court to set aside the proceedings, which being denied, the present appeal was taken. The grounds of the questions raised are stated in the opinion.

Wilber & Van Clief, for the appellants.

E. Crummy, for the respondents.

BY THE COURT.*—BROWN, J—The papers read upon this motion before the County Court, afford ground for the belief that the proceedings upon the execution of the writ *de lunatico in-*

* Present, LOTT, EMOTT, and BROWN, JJ.

Lamoree's Case.

quirendo were not free from some irregularity, and if the principal fact which it was the object of the proceedings to establish and ascertain was left open to any doubt, it might be right to set them aside, and institute a new inquiry, so that the mental condition of the person affected by them should be established positively and certainly. The lunacy of Jerusha Lamoree is not, as I understand, disputed. Her relatives, and all others who know any thing of the state of her mind, concur with the jury in the opinion that she is a lunatic and incapable of managing her affairs, and unfit to govern herself. Under such circumstances, no good purpose could be served by vacating the proceedings prior to, and including the filing and confirmation of the inquisition, and we are, therefore, of the opinion that the County Court did right to deny that part of the motion.

The petitioner, upon whose application the proceedings were instituted, is Susan Van Wagner, and they were conducted up to the 5th December, 1859, by Tallman, Payne & Lord, as her attorneys. On that day, by a written consent to that effect, they ceased to act further in that capacity, and Wilber & Van Clief, were substituted in their place.

A petition was prepared, signed, and sworn to, by Susan Van Wagner, on the 24th November, 1859, praying for the appointment of Alexander H. Vail, of Schodack, in the county of Rensselaer, and Robert Cookingham, of Hyde Park, Dutchess county, committee of the person and estate of the lunatic. Annexed to it was the written consent of her brother, George Smith, that they be appointed such committee. Cookingham, it appears, is nephew and one of the next of kin of the lunatic, and Alexander H. Vail is her brother-in-law. The time when this petition was presented, and the order consequent upon it obtained, is one of the points in dispute—the moving party alleging that it occurred after Tallman, Payne & Lord had been superseded in their office as the attorneys of the petitioner, and on that account unauthorized and irregular; while the adverse side allege it was presented, and the order obtained for the appointment of the committee on the 3d day of December, which is the day of the caption of the order.

In the view I entertain of the case, the real time is of little consequence. The order is made upon reading and filing the inquisition, and also upon reading and filing the petition of

Susan Van Wagner, and declares that Alfred Duer, of the town of Clinton, be appointed committee of the person and estate of the lunatic, upon giving the customary bond in the penal sum of \$25.000.

The real complaint of the moving party is the making of this appointment, and I am constrained to say that the complaint is just; for the appointment of a stranger to execute a trust so delicate and of such responsibility, without the request of the relatives and next of kin of the lunatic, without an order of reference, and without notice to the persons having a prospective interest in the estate, is not authorized by the practice of the courts having jurisdiction over such matters.

If the next of kin unite in a petition, and name a proper person as committee, or give their consent in writing to the appointment of a particular person, it is usual to select such person. But if the next of kin have not assented or united in the petition, there should be an order of reference, and then the next of kin are entitled to notice of the proceedings upon the reference, and to propose themselves as the committee.

In the Matter of Taylor (9 *Paige*, 611), the chancellor held that it is not a matter of course to commit the guardianship of the estate of a lunatic to those who are presumptively entitled to it upon his death, as heirs or next of kin. But they will be appointed the committee of his estate when it satisfactorily appears to the court they are the persons most likely to protect his property from loss.

Blackstone, in his commentaries (1 *Blackst. Com.*, 305), after saying that, to prevent sinister practices, "the next heir is seldom permitted to be the committee of the person, because it is his interest that the party should die," also says: "But it hath been said there is not the same objection against his next kin, provided he be not his heir, for it is his interest to preserve the lunatic's life in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy. The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition, accountable, however, to the Court of Chancery, and to the *non compos* himself, if he recovers, or otherwise to his administrators."

In *Exp. Le Heup* (18 *Ves.*, 221), the master had approved of

the appointment of a stranger, as committee of the estate, in preference to the lunatic's uncle and another who had been proposed, and both were unexceptionable. Lord Eldon sent back the report to be reconsidered, and said, that when strangers are appointed, they acquire an influence over the private and domestic concerns of a family, which ought always to be restricted if possible within the circle of the family itself.

The law in dealing with the persons and estates of that unfortunate class who are bereft of reason and intelligence, proceeds upon principles which must commend themselves to the sanction and approbation of every humane and enlightened mind. Considering the close and intimate relations which the committee must maintain with the family and relatives of the lunatic, his power of control—all but absolute—over his person and property, the remote possibility of his ever being in a condition to make any disposition of his estate, which shall prevent its descent and transmission to the heirs-at-law and next of kin,—a rule of practice or of positive legislation which would justify the appointment of a stranger to execute the trust of committee, without the assent and against the will of his family or other relatives, and without any sufficient or adequate cause, would be oppressive and intolerable. It would be little less offensive than to deprive a person of his property without cause, and without the authority of law.

In respect to character, capacity, and responsibility, we think Mr. Alfred Duer entirely unexceptionable. But he is a stranger to the lunatic; his name was not proposed by any of her relatives, or those interested in the protection and preservation of her estate. They had no opportunity to be heard, for there was no reference to which they could have been summoned.

The petition upon which the appointment was made, prayed that to the nephew and brother-in-law of the lunatic might be committed the trust, and no reason is assigned or suggested why they were set aside and another selected. It was, indeed, suggested as an objection to Alexander H. Vail, that he was not a resident of the county of Dutchess, when the proceedings were had, and hence not amenable to the process of the County Court. This objection is futile. He was a resident of the State, and within the jurisdiction of its courts, and subject to their orders and judgments. In this, as in all

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other trusts of a similar kind, no more limited residence of the trustee is required.

In conclusion, we think the order appointing the committee was improvidently granted, and whenever it was brought to the notice of the County Court it should have been vacated. So much of the order appealed from as denied the motion to set aside the proceedings subsequent to the filing of the inquiry is reversed, and such proceedings are vacated and set aside, to the end that the petitioner, Susan Van Wagner, may have an opportunity to renew her application for the appointment of a committee of the person and estate of the lunatic.

No costs of appeal are given to either party.

REMINGTON *v.* KING.

Supreme Court, Seventh District; Special Term, October, 1858.

BUILDING COMPANY.—INDIVIDUAL LIABILITY OF STOCKHOLDERS.

A stockholder in a building company formed under chapter 122 of the Laws of 1851, who has made advances or incurred liabilities for the benefit of the corporation, may, when called upon to respond to his statutory liability, set off such advances or liabilities in extinguishment thereof.

Demurrer to answer.

The facts are stated in the opinion.

Underwood, Cox, and Avery, for plaintiffs.

Filley M. King, for defendant.

DAVIES, J.—The plaintiffs having a debt against an association organized under chapter 122, Laws of 1851, have recovered judgment against the association, and now bring suit against the defendant, as a shareholder in the association, to recover the same debt.

Section 11 of the act referred to, provides that "all shareholders of any association formed under that act, shall be individually liable to the creditors of said association, to an amount equal to the amount of stock held by them respectively, for all debts contracted by such association."

The defendant in his answer sets up, so far as it is material to consider, that he was a stockholder in said association to the amount of \$200, and that at the time of the commencement of this suit he was a creditor of the corporation to an amount exceeding the amount of stock so owned by him, and being such creditor, he was not bound to respond to the plaintiffs' claim. To this portion of the answer the plaintiffs have demurred, thereby admitting the defendant's allegation.

The question is therefore raised by the demurrer, whether the defendant had a right to have his debt against the association go towards, or in liquidation of that which he owes by virtue of his being a stockholder.

As such stockholder, he is liable to pay, in addition to his stock, an equal amount for the benefit of the creditors of the association.

But he is himself also a creditor, having the same right as these plaintiffs, and equally entitled with them to be paid. They have no greater equities to be paid than he, and the circumstance that one has obtained a judgment against the association before the other, does not change their legal rights. The liability of the stockholder by the statute, is to pay "for all debts contracted by the association," to an amount equal to his stock. If the association has contracted a debt to this defendant, and that is conceded by the demurrer, no reason is perceived why that debt is not equally to be paid with that of these plaintiffs.

This would seem to be clear upon principle; but in this State, I regard it as established by authority which has not and cannot be questioned.

I refer to the case of *Briggs v. Penniman* (8 Cow., 387). The statute creating the liability in that case, was in substance the same as that relied on in this.

WOODWORTH, J., in delivering the opinion of the court, says: "The question there is, whether a stockholder, who in addition to full payment for his stock, has made advances, and thereby became a creditor to the company, can be compelled to pay the

same sum to another creditor who prosecutes (should so much be necessary to satisfy him), without any allowance or deduction for the stockholder's individual debt. I entertain no doubt, that by a just construction of the act, where there are several creditors, the fund made liable for debt, if insufficient to discharge the whole, should be distributed ratably, and that the principle, that equality is equity, should be applied to such a case.

"This conclusion I apprehend would correspond with the spirit and intent of the act. It appears to me that a stockholder, who is also a creditor, stands on the same ground, and is entitled to claim under the act, equally as a creditor who is not a stockholder."

The only other opinion delivered in the court of last resort was by Senator SPENCER, who upon this point says: "The members of the company might *bona fide* advance money, as they allege they have done, to carry on the business of the association, and they are equally entitled with any other creditors to be indemnified from the funds of the company, or from the individual liability of the stockholders."

The question raised in this cause was distinctly presented to the court in the case of Tallmadge v. The Fishkill Iron Co. (4 Barb., 382), and the case of Briggs v. Penniman, just cited, was referred to as authority.

It must, therefore, I think, be regarded as settled, that the stockholders, who have made advances, or incurred liabilities for the benefit of the corporation, may, when called upon to respond to a statutory liability, set off such advances or liabilities in extinguishment thereof.

It follows, upon the facts admitted by the demurrer, that the defendant is a creditor of the association to an amount greater than his statutory liability, and that consequently such liability is extinguished.

Judgment must therefore be given for the defendant, with costs. The plaintiffs to be at liberty within twenty days to withdraw the demurrer, and reply to the matters set up in the answer, on payment of costs.

LEWIS a. FOX.

New York Common Pleas; General Term, October, 1860.

COSTS.—APPEALS IN MARINE COURT.

What costs may be allowed by the New York Marine Court on appeals, and by the Common Pleas, on appeal from that court.

Appeal from a judgment of the Marine Court.

BY THE COURT.—HILTON, J.—This action was commenced in the Marine Court by warrant of attachment issued by one of the justices of that court, under the provisions of sections 34 and 35 of the act to abolish imprisonment for debt, &c., passed April 26, 1831. On the return of the warrant the plaintiff had judgment, which, on appeal to the general term of that court, was reversed, and final judgment given for the defendant, upon the ground, as it seems, that the affidavit on which the attachment was granted did not state sufficient to authorize the issuing of such a process, and that, therefore, the court acquired no jurisdiction of the suit. On the reversal, the general term awarded the defendant \$48.96 costs and disbursements, and for which judgment has been entered.

The plaintiff having appealed, asks us to review the judgment in respect to the sufficiency of the affidavit referred to; and also as to the right of the Marine Court to award the costs thus imposed upon him.

Upon the first ground stated, we are of opinion, that the affidavit was clearly insufficient to justify the issuing of the attachment, and the Marine Court was right in so holding.

As to the second, a brief reference to the several statutes upon the subject of costs in the Marine Court, will show that the sum allowed is much beyond the power of that court to award to a respondent upon appeal in any case. The act of July 21, 1853 (*Laws of 1853*, 1165, ch. 614), under which the Marine Court de-

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rives the power to review, upon appeal at general term, the judgments rendered by any of its justices, allows (§ 5) the same costs and disbursements on such appeals, as on appeals from justices' courts to this court; and these are specified in section 371 of the Code, which provides that there shall only be allowed on such appeals, to the appellant on reversal \$15, and to the respondent on affirmance \$12, with the fees of officers and disbursements in addition, which consist of the sheriff's or constable's fees, the sums paid to the clerk during the progress of the cause, or for any copies of papers made by him, and necessary to be procured, together with the expenses incident to the filing of any transcript of the judgment. These items, added to the justice's fee of \$2, for his return, constitute all the fees of officers and disbursements which can be allowed by us on appeals from justices' courts; and it follows that the Marine Court cannot, under the provisions of the act of 1853 referred to, allow any other.

But it is said that, by a rule of that court, an appellant is required to print his case and points upon an appeal taken to the general term, and that this expense must therefore be considered as a necessary disbursement, to be allowed as part of the costs to be awarded in the final judgment. Our only answer to this is, that the Legislature has restricted this court in the amount of costs and disbursements which it may award upon appeals from justices' courts; and the Marine Court, as already shown, is restricted in like manner and to the same extent.

By section 365 of the Code, we are required to hear all such appeals upon the original papers, and it is therein expressly declared that no copy thereof need be furnished for the use of the court. A provision of so positive a character we have always supposed denied to us the right to impose upon either party to such appeals any expense in the way of either copying or printing of papers to be used on the argument of the appeals before us, and we have no doubt that if we should require such an expense to be undergone, the party incurring it would not be entitled to have it allowed him as a disbursement within the meaning of section 371.

Entertaining these views, we are of opinion that in the present case the Marine Court has exceeded its powers by giving

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judgment in favor of the defendant for a greater amount of costs and disbursements than the law authorizes.

The judgment must, therefore, be reduced to the costs and disbursements which are usually allowed in this court on appeals from justices' courts, and thus modified, it will be affirmed without costs of this appeal to either party.

WILMERDING *a.* MOONEY.

New York Common Pleas; General Term, October, 1860.

**ARREST.—FALSE REPRESENTATIONS.—FRAUDULENT DISPOSAL
OF PROPERTY.**

Defendants upon the faith of their explicit representations that their stock of goods were worth \$20,000, obtained, on the last day of October, a loan of \$10,000 from the plaintiffs, positively assuring them that this loan would prevent their failure. On the 6th of January following, they transferred their stock to plaintiffs, on account of their indebtedness, representing the stock to be worth \$9,000; but after appraisal, they consented that plaintiffs should credit them with \$4,000 for it, and on a sale it brought even less. In an action to recover the remainder of the indebtedness, the plaintiffs caused the defendants to be arrested.

Held, that they were not entitled to discharge in the absence of definite explanations as to the deficiency in the amount of the stock which they had represented they had. Without such explanation it must be inferred that either they intentionally misrepresented the value of the property to get the loan, or afterwards made away with a large portion of the stock, with the design of defrauding their creditors.

Appeal from order denying motion to vacate arrest.

The moving papers were very voluminous, but their contents are stated in the opinion of the court.

BY THE COURT.—DALY, J.—After a careful examination of this case, we are of opinion that the charge of fraud upon which the defendants have been arrested, is sustained. We think that no other conclusion can be arrived at but that, either the de-

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defendants intentionally misrepresented the value of their stock and the state of their affairs, to get the loan of \$10,000 from the plaintiffs; or, if their statement be true, and their stock was, at the time, of the value which they represented it to be, that they afterwards made away with a large portion of it with the design of defrauding their creditors.

On the 31st of October they induced the plaintiffs to make the loan by representing that their difficulty was but of a temporary nature; that they had then in their store, stock the value of which was over \$20,000, and that with this loan of \$10,000 they would be enabled to meet all their liabilities as they matured. The plaintiff, Humbert, urged them to examine their books carefully, and ascertain with certainty whether the loan would enable them to meet all their liabilities, for that the plaintiffs would not make it unless the defendants were certain that their failure would be averted by means of it, as the plaintiffs did not wish to create a new liability to be secured as a preferred debt in an assignment. The defendants reiterated their former statement, assuring the plaintiffs that \$10,000 would make them completely safe, and that they would be able to meet all their liabilities, and repay the loan in the month of January following. Upon this assurance, the plaintiffs agreed to advance \$10,000, taking the defendants' notes, payable in December, January, and February, and gave the defendants a check for \$9,834.15, deducting the interest for the time which the defendants' notes had to run. A portion of the defendants' outstanding liabilities consisted of notes held by the plaintiffs, maturing within sixty days, and it was agreed that these notes should be discounted by the defendants, and paid out of the loan, which was done. After this positive assurance as to the state of their affairs, and of their ability to get through with the aid afforded them, the defendants, in fifteen days afterwards, came to the plaintiffs to ask a further loan of \$3,000, which was very naturally refused after the statement they had made, and the positive knowledge which they professed to have of their financial condition. In ten days after, they failed.

On the 6th of January following, they transferred to the plaintiffs the stock then in their store, representing it to be of the value of \$9,000. It was appraised by a clerk of the plaintiffs. He says that no invoice was shown him by the defend-

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ants; that he minutely examined the goods, valuing each article; that his appraisal was \$4,300 as the highest price which the goods were worth. After this appraisal was made, the defendants agreed that the plaintiffs might take the goods at \$4,000. The plaintiffs did so, crediting the defendants to that amount, and sold them, the plaintiffs being auctioneers, at auction, unusual efforts being made to secure a good sale, and they brought \$3,387.

The defendants swear that their stock in the month of October was of the value, at cost prices, of \$24,000. If this was true, it was for them to show what had become of \$20,000 within two months, or valuing what they transferred to the plaintiffs at their own estimate of \$9,000, of at least \$15,000 worth. They have put in a voluminous affidavit of over eighty folios, which is minutely particular in the elaboration of matters of little importance; but in respect to what became of the stock, a point upon which explanation was imperatively demanded to repel the charge upon which they have been arrested, they content themselves with the brief and summary statement, that from the time of their failure they sold large portions of their stock for cash, which cash they used in making their payments; that they paid all the paper falling due before their failure except about \$1,500, on which they got an extension; but not a single creditor to whom any payment was made is named. From the time of their failure until the 11th of January, they say that they paid off some judgments obtained against them, and compounded for some of their debts by paying a percentage in cash, and that they gave a small portion of their stock to one Walsh, in part payment of an indebtedness of \$7,993. A search, instituted by the plaintiffs, shows judgment against them to the amount of \$3,157, and the list of their creditors shows an indebtedness to the extent of \$91,287.33. About one-third of their creditors, and to whom more than one-half of the amount was due, were called upon at the instance of the plaintiffs, that is, all that could be seen up to the time of the hearing of the motion, and the answers obtained were that they had received nothing, except in one instance, of a payment of \$500. A statement could have been readily made from the defendants' books, and annexed to their affidavit, showing the creditors whom they paid, and the amount respectively paid to each, which would

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have been worth more as an exposition of their affairs, and as a vindication of their character as honest merchants, than all that is contained in their bulky affidavit. The absence of any thing of the kind, and the substitution in its stead of general statements which it is easy to make and difficult to contradict, as no particular payment is specified, leads our mind to the conviction that it was their design to pay nobody, and that if they had, as they say, stock to the value of \$24,000, the difference between that amount, and their own estimate of the value of that which they turned over to the plaintiffs, that is, \$15,000 worth of goods, has been conveyed to their own use in fraud of their creditors, either by converting it into cash, or making some other disposition of it. They say they were indebted to Mr. Walsh in the sum of \$7,993.80 for consignments made to them, and that they turned over to Walsh a small portion of their stock in part payment. This small portion, which by their own account paid but a part of this indebtedness, is augmented by their counsel to the full value of that indebtedness. Without any foundation for doing so, he fixes it as of the value of \$7,993, and adding to that his clients' estimate of the value of what they turned over to the plaintiffs, \$9,000, he adopts this way of accounting for \$16,993 worth of the stock, telling us that the difference, \$7,007, was not much for the sales of such a concern in two months. The omission of the defendants in their affidavit of all particulars in respect to the disposition of at least \$15,000 worth of stock, or of the debts which they say they were engaged in paying, and have paid, may well be put in conjunction with their counsel's mode of accounting for this large amount of their property.

Up to the time of their arrest they did nothing towards providing for the creditors. They proposed to pay fifty cents on the dollar, which their creditors were generally willing to accept, but afterwards declined because some of their creditors, whom they do not name, would not take it, and because the value of their assets had depreciated by delay, and they did not think they could pay over twenty-five cents. They then offered that amount, but nothing came of it. They were asked to make an assignment for the benefit of creditors, and have not done so, giving as a reason that their counsel advised them not to do it, and that they believed that it would be better for their

creditors that they should not, inasmuch as the general experience of all mercantile men is, that when parties assign only book-debts and bills recoverable, they depreciate and prove uncollectable and worthless. For this reason they keep every thing in their own hands, disclosing nothing, and doing nothing for four months after their failure, except to dispose of their stock and to collect their debts; and then, when arrested for fraud, instead of a direct and business-like exposition of their affairs, they devote the main part of their affidavit to an attempt to convince us that the kindly act of the plaintiffs, in coming to their aid to enable them to meet their paper as it became due, was a mere trick on the part of the plaintiffs to get an ordinary business debt converted into a confidential one. If the defendants hoped by this means to divert our attention from the aspect which the case they have presented exhibits, wanting as it is in explanation, the most obvious and ordinary, they have deceived themselves, and the labor that has been devoted to the preparation of their long and elaborate affidavit has been wasted.

The order made at special term is affirmed.

PHILLIPS *v.* SIMMONS.

Supreme Court, First District; Special Term, October, 1860.

HUSBAND AND WIFE.—COSTS OF ACTION FOR DIVORCE.

If a wife who is plaintiff in an action for divorce discontinues it, or is defeated in it, and judgment is rendered against her, her husband is not liable for costs incurred by her therein.

Demurrer to complaint.

The action was brought by plaintiffs, who were attorneys and counsellors at law, to recover for services and disbursements.

The complaint stated that at a time named, the plaintiffs, on

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the retainer of the wife of defendant, commenced an action in her favor against the defendant, for a divorce on the ground of cruel and inhuman treatment, and for some months acted as attorneys and counsel for her in that action, when the parties thereto became reconciled and settled the action, and have ever since been, and are living together as man and wife; that their services as such attorneys and counsel for the wife were reasonably worth two hundred and fifty dollars, and they expended in carrying on that suit forty-one dollars and seventy-four cents; and that there was due and owing to plaintiffs from defendant two hundred and fifty-seven dollars and seventy-four cents, for which, with interest and costs, they demanded judgment.

The defendant demurred to the complaint.

P. Cantine, in support of the demurrer.

Plaintiffs, in person, opposed.

BONNEY, J.—The defendant must have judgment on this demurrer. I can see no possible ground for maintaining the action. Surely a wife cannot be considered (as plaintiffs have attempted to argue) the agent of her husband, with authority to commence an action against himself, perhaps without cause, and afterwards discontinue it, and thereby make him liable to her attorneys for the costs of the action. While an action for divorce is pending, a wife may, in a proper case, obtain an order that her husband furnish her with means for carrying it on; but when the wife is plaintiff in such an action, and has either discontinued it or been defeated, and judgment been rendered against her, neither she nor her attorneys or counsel can have any claim upon him for the costs or expenses of her fruitless and probably causeless prosecution. *Shelton v. Pendleton* (18 Conn., 417); *Wing v. Hurlburt* (15 Verm., 607); *Dorsey v. Goodenow* (*Wright's R. (O.)*, 120), are authorities for this decision.

Judgment for defendant.

PEOPLE *on rel.* LYNCH *a.* THE ALDERMEN OF
NEW YORK.

Supreme Court, First District ; At Chambers, November, 1860.

MANDAMUS.—MUNICIPAL CORPORATION.

The court will not grant a mandamus to compel the Common Council of a Municipal Corporation to confirm the award of a contract to the lowest bidder therefor. The Common Council have power to reject the lowest bid, in the exercise of a sound discretion, and the court will not interfere with its exercise.

Motion for peremptory mandamus.

The relators obtained an alternative mandamus requiring the aldermen to take action, and pass upon or confirm the award of a contract to the relators for cleaning the streets and avenues of the city of New York for the term of five years, or show cause, &c.

The aldermen returned that they had taken action thereon, and had refused to confirm the award of the contract.

The relators insisted that the bid made by them was the lowest offered; that the inspector had awarded them the contract as by law he was compelled to do, they being the lowest bidders; that their security for the performance had been approved, and that the aldermen had no such discretion as they claim of refusing to confirm the award.

J. R. Whiting, for the relators.

H. H. Anderson, for the Board of Aldermen.

LEONARD, J. (after stating the facts).—The only question to be considered is, whether the aldermen can, in their discretion, reject or refuse to confirm the award of their contract under such circumstances.

The case of *The People on rel. Dinsmore a. The Croton Aqueduct*.
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People on rel. Lynch a. The Aldermen of New York.

duct Board (6 *Abbotts' Pr.*, 42), is, I think, decisive of the question. The city ordinances, lawfully made, forbid any contract to be executed for the city for a sum exceeding \$250; until it has been confirmed by the Common Council.- Without considering whether the contract in question was an advantageous one to the city or not, it is evident that the power to confirm implies the authority to reject. Any unjust or extravagant contract ought to be rejected, although it should be the lowest and most favorable offer made. It would be an idle ceremony to refer the proposals, estimates, and contracts to the Common Council if their duty was, in all cases, to confirm the contract, provided it appeared to be the lowest offer. It is necessary that the power to reject, as well as to confirm, should be vested in the Common Council. Their discretion ought to be wisely exercised, but if it is not so exercised, this court cannot interfere to supervise the manner in which the discretion of the Common Council is manifested. The court might not, probably would not, be able to exercise any better discretion in respect to confirming or rejecting a contract for city work than the Common Council. The Common Council are answerable to their constituents for the manner in which they exercise their discretion, but not to the Supreme Court. If a peremptory mandamus could be invoked for such a cause, the ultimate power of city legislation might come to be finally devolved upon the courts.

This court can compel the Common Council to act in certain cases, but cannot define the manner of their pursuing their legislative duties.

The application for a peremptory mandamus to compel the confirmation of the award of the contract in question, is denied.

PAHQUIOQUE BANK *a.* MARTIN.

PAHQUIOQUE BANK *a.* MARTIN.*Supreme Court, First District; Special Term, November, 1860.*

PROTEST OF NOTE.—COMPLAINT AGAINST INDORSER.

Notice to an indorser of a note of non-payment thereof, is not sufficient to charge him. He must have notice of presentment or demand and non-payment.

In a complaint against an indorser, an allegation that the note was duly presented and payment demanded, but it was not paid, and due notice of non-payment was given, &c., is insufficient on demurrer.

Demurrer to complaint.

The contents of the complaint sufficiently appear in the opinion.

BONNEY, J.—This action is against defendant Martin as indorser of a promissory note. The complaint, to which the defendant has demurred, states, among other things, that the note was duly presented for payment, and payment thereof demanded, but it was not paid; that the note was thereupon duly protested for non-payment, “and due notice of such non-payment was given to the defendants,” Martin and others.

Notice of non-payment only, is, neither directly nor by implication, notice of presentment or demand, and consequently is not notice of the dishonor of the note within a proper meaning of the word. To make an indorser liable, he must be notified in proper time that the bill or note which he has indorsed has been dishonored. (*Cook a. Litchfield*, 5 *Sandf.*, 330; *S. C.*, 5 *Seld.*, 279; *Coddington a. Davis*, 1 *Comst.*, 186; *Edw. on Bills*, 593, and cases cited.)

This statement in the complaint is, in my judgment, defective. The other allegations to which objection is made are, in my opinion, sufficient.

Judgment for defendant Martin.

SCHENCK v. CAMPBELL.

New York Superior Court; General Term, November, 1860.

INJUNCTION.—VENDOR AND PURCHASER.—COVENANT AGAINST
NUISANCES.

The vendor of city lots required from the purchaser a covenant against the erection of any livery stable, &c., on the premises sold, and on his own part covenanted that no more than two houses should be erected on the residue of the land owned by him.

Held, that the purchaser was entitled to an injunction restraining the vendor from erecting a livery stable on the residue.

In such a covenant, the word house may be understood as meaning dwelling-house.

Appeal from an order denying a motion to vacate an injunction theretofore granted against the defendants.

J. T. Williams, for defendants, appellants.

W. Curtis Noyes and *B. D. Silliman*, for plaintiff, respondent.

BY THE COURT.*—MONCRIEF, J.—The defendant Campbell, in the year 1855, being the owner of a plot of ground corner of Fifth avenue and Thirty-second-street, sold and conveyed one-third part thereof to the plaintiff. The agreement provided, and the conveyance contained covenants, that the plaintiff should not permit any livery, stage, or omnibus stable, &c., on the premises conveyed to him; and the defendant Campbell covenanted that “no more than two houses should be erected on the residue of the land owned by him,” &c.

Some time about March, 1860, the defendant Campbell having agreed to lease said residue of land (less one lot sold to Mrs. Underhill) to the defendant Hager, and to erect thereon a livery

* Present: BOSWORTH, Ch. J., J. HOFFMAN, WOODRUFF, MONCRIEF, and ROBERTSON, JJ.

stable, and being engaged in preparing to erect such livery stable, and intending it to be occupied by said Hager as and for a "livery stable, as soon as he could," application was made to a justice of this court for an injunction restraining the defendants, and it was granted.

The defendants, upon affidavit, obtained an order to show cause why said injunction should not be set aside, &c., and the respective parties having been heard, an order was made denying the motion to dissolve the injunction.

From this order the defendants appealed.

The agreement and the covenants in the deed between the plaintiff and the defendant Campbell, in my opinion, manifest a clear intention to enhance the value of the adjacent property. The plaintiff was restricted against permitting on the premises any livery, stage, or omnibus stable, slaughter-house, butcher's or meat shop, tallow-chandlery, smith-shop, forge, furnace, steam-engine, manufactory of certain designated articles, or in which any kind of business, noxious or dangerous to the neighboring inhabitants should be carried on; this language, in its plain, ordinary, and popular sense, would seem to carry an implication that the adjoining lands owned by the grantor (Campbell), and receiving such a covenant, were to be subject to a like restriction, and adapted to some particular use and purpose, and with this in view, the deed contains immediately following, a covenant on the part of the grantor (the defendant Campbell), that "no more than two houses shall be erected on the residue of the land owned by me between the premises conveyed and the corner of Thirty-second-street."

It is perfectly obvious in what sense the plaintiff construed the covenants in the deed. If the words "two houses" have other meaning than two dwelling-houses, of the general character and description adopted, and used in that particular locality for private residences, to him the covenants were a "delusion and a snare."

The defendant Campbell subsequently conveyed (1857) to Mrs. Underhill twenty-six feet of the residue of the premises (at a greatly advanced price), the deed therefor containing a clause against nuisances, &c., and a covenant by the grantor, "that only one dwelling-house shall be erected" upon the land conveyed.

Schenck *v.* Campbell.

In *Turner v. Evans* (2 *Ellis & Blackb.*, 518), the rule is laid down that "the language of all contracts must be construed with reference to the circumstances attending the particular transaction. We are to look at the whole instrument, and the object of the parties, and see what is the intention of the parties, to be collected from the whole of the language with reference to those."

The object of the plaintiff was expressly stated to the defendant Campbell at the time of making the agreement to purchase, "to be the erection of a very expensive house;" this is distinctly averred by the complaint, and is not denied by Mr. Campbell.

The plaintiff did erect a very expensive house, intended for, and used by him as a private residence, at a cost of over \$50,000.

Mrs. Underhill also erected a first-class dwelling-house upon the premises conveyed to her.

The specific class of buildings, or the purposes against which there was to be a special restriction, characterized by Mr. Campbell as "the usual nuisance clause," had its origin probably in the fact that Mr. Campbell held his title to the lands in question subject to such restriction.

The defendant Campbell must have known the sense in which the plaintiff accepted the promise and covenant not to build more than "two houses" on the residue of the land.

The defendant Campbell intended, by the use of the words "two houses," to restrict and confine the residue of his land to the erection of two dwelling-houses; it was his interest at that time to do so; subsequently, giving this construction to the words of his covenant, he "often applied to said plaintiff to remove said restriction, so as to allow him (defendant) to put up three dwelling-houses," &c., &c. Again, the defendant Campbell, mindful of his covenant with the plaintiff when he conveyed a portion of the "residue of his land" to Mrs. Underhill, was unembarrassed in defining what was intended and to be understood by the term "two houses;" his grantee was required to covenant that only "one dwelling-house" should be erected on the premises conveyed.

If the words are to be taken in their ordinary and popular meaning. Webster says: a "'house' in a general sense, means

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a building or shed intended or used as a habitation or shelter for animals of any kind, but appropriately a building or edifice for the habitation of man, a dwelling-place, mansion, or abode for any of the human species." Tomlin's Law Dictionary defines a "house" to be "a place of dwelling or habitation."

If an advertisement should appear in one of our city newspapers, offering "for sale or to be let two houses situated on the Fifth avenue, between Forty-second-street and the Parade Ground," it seems to me not unreasonable to suppose that the great majority of the readers would be disappointed upon being advised that it did not refer to first-class dwelling-houses; and the astonishment of all of common understanding would, I think, be quite general, when informed that the "two houses" were simply places of shelter for horses, and not intended as a habitation for man.

The order denying the motion to vacate the judgment was clearly right, and must be affirmed, with \$10 costs.

MARTIN *a.* THE MAYOR, &c., OF NEW YORK.

New York Common Pleas; Special Term, October, 1860.

JUSTICE'S JUDGMENT DOCKETED IN COUNTY CLERK'S OFFICE.—
MARINE COURT.—COMPTROLLER'S APPLICATION TO OPEN JUDGMENT.

The New York Marine Court cannot open judgments rendered by them, unless the same were obtained by default.

The act of 1859, giving the comptroller power to take all necessary means to open collusive and fraudulent judgments against the city, does not give to the Marine Court such power.

Though a transcript of such judgment has been filed in the county clerk's office, the Common Pleas have no power to open the judgment.

The provision of section 68 of the Code, as amended in 1851,—that judgments of such a court, when docketed in the county clerk's office, shall be deemed judgments of the Common Pleas,—means that they are to be so considered, simply for the purpose of enforcement.

When a transcript of a judgment recovered in the Marine or in a Justice's Court has been filed in the county clerk's office, the court where the judgment was

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recovered can no longer issue execution, but the judgment must be enforced by an execution in the Court of Common Pleas alone.

On an application by the comptroller to the Common Pleas to open a judgment against the city, recovered in the Marine Court, the proper course is to enjoin the plaintiff from proceeding, without prejudice to his right to sue on the judgment in a court of record.

Proceedings to open four several judgments recovered against the defendants by George Martin, Oliver Valentine, H. F. Gilmore, and Samuel Nusam, respectively.

These actions were all originally commenced in the Marine Court, and the judgments were there obtained. Transcripts were then filed in the county clerk's office, and executions thereon issued, as out of the Court of Common Pleas.

I. Motion in the Common Pleas, by the comptroller, under Laws of 1859, chapter 489, section 5, to vacate the judgment of each of the above plaintiffs against the defendants.

Wm. Curtis Noyes, for the motion, was about stating the grounds of the application, when

Richard Busteed, counsel for each and all of the plaintiffs, objected, that the Court of Common Pleas cannot entertain a motion to vacate a judgment of the Marine Court on the mere filing of a transcript thereof in the county clerk's office. (*McCunn a. Barnett*, 2 *E. D. Smith*, 521.)

BY THE COURT.—DALY, J.—This court can only acquire jurisdiction by appeal over cases which have been tried in the Marine Court. The filing of the transcript is merely for the purpose of rendering the judgment a lien on real estate, and of issuing execution thereon to the sheriff of the county.

On motion of *Mr. Noyes*, the court directed an order to be entered in each of these causes, postponing the further hearing of this motion for ten days, and enjoining the plaintiffs from proceeding to enforce their judgments in the mean time.

II. An application similar to the above was then made in the Marine Court.

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Elbridge T. Gerry, for the motion.

George R. Thompson, opposed.

BY THE COURT.—MAYNARD, J.—The motion made in these cases, is to vacate the several judgments rendered in favor of the plaintiffs on the ground of collusion or fraud, or for certain irregularities alleged to exist by the defendants. It is admitted that these judgments were rendered by this court, after a regular and fair trial, at which both parties were represented. It has been repeatedly decided by the Court of Common Pleas, that this court cannot open judgments rendered by it, unless the same were obtained by default. But it is urged on the part of the defendants, that the fifth section of the tax-levy act, gives this court authority, as other courts, to open judgments against the defendants. That section gives the comptroller the right, when he believes that a judgment has been obtained by collusion, or is founded in fraud, to apply to the court, and take such steps to open and reverse the same as are necessary. Assuming that this court has no power to open judgments rendered by it after trial, I cannot think that the language of that section confers this new power upon it. This is essentially a statutory court, and its power is confined strictly within the limits prescribed by statute. It can take no power by implication. The question raised by counsel as to the constitutionality of the act, the extent of the power it confers upon the comptroller, and the questions of fact raised in these cases, under the view I have taken, it is unnecessary for me to examine.

The motion must be denied, with costs in each case.

III. The cases then came up again in the Common Pleas, on an order to show cause, on which—

Wm. Curtis Noyes, moved to make the stay of proceedings perpetual, restraining the plaintiffs from taking any further proceedings in the enforcement of their judgments; and urged in support of his motion—I. The judgments are judgments of this court. (*Code*, § 68; *Sholts a. Judges of Yates Co.*, 2 *Cow.*, 506; *Ginochio a. Figari*, 2 *Abbotts' Pr.*, 185.)

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II. A judgment obtained by fraud may be set aside on bill filed, and in some cases if money is paid out, it may be recovered back. (*Moses a. Macferlan*, 2 *Burr*, 1005; *Greenl. Overr. Cases* (ed. 1856), 340, where the cases are cited in which this case is limited; *Wright a. Miller*, 4 *Seld.*, 9; *Dobson a. Pierce*, 2 *Kern.*, 156; *Cooper a. Ball*, 14 *How. Pr.*, 279.)

III. This court having power over its process may, on motion, restrain the parties from abusing it, by perverting it to the enforcement of a fraudulent judgment. 1. Where the inferior court has no power to grant relief, a court of equity, in cases of fraud, will always interfere, and forever enjoin the party obtaining the judgment from proceeding thereon. (*Floyd a. Jayne*, 6 *Johns. Ch.*, 479.) 2. And whenever a valid judgment at law has been iniquitously obtained, equity will annul what has been improperly done under it. (*Bissell a. Bozman*, 2 *Dev. Ch.*, 160; *Livingston a. Hubbs*, 2 *Johns. Ch.*, 512.) 3. Whenever the court has power to make an order, in consequence of having jurisdiction over the subject-matter of the suit or proceeding, and which a person is bound to obey in consequence of his being either actually or constructively a party to the suit, it may enforce obedience to such order by the process of injunction. (*Matter of Hemniss*, 2 *Paige*, 317; *Colt et al. a. Cornwall*, 2 *Root*, 109.) This last case is directly in point, being on a petition in the nature of a motion to restrain the issuing of an execution at law, and the same principle is involved in the case in *Paige*. 4. So, satisfaction of a paid judgment may be compelled on motion; a bill in equity is unnecessary. (*Briggs a. Thompson*, 20 *Johns.*, 294.) So to set aside a judgment for fraud. (*McLaren a. McLaren*, 6 *Wend.*, 537.) It is now a well-settled general principle, that in all cases where an *audita querela* would lie, relief may be had on motion addressed to the equitable power of the court. (*Baker a. Ulster Co. C. P.*, 4 *Johns.*, 191; *Graham's Pr.*, 2 ed., 450-1; *Pleim a. Henshall*, 10 *Bing.*, 24.) And although that remedy is applicable mainly to matters occurring after judgment, yet the rule is the same as to all matters happening before, of which the defendant could not avail himself, or from the use of which he was improperly excluded prior to that time.

George R. Thompson, opposed.

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BY THE COURT.—DALY, J.—Judge Maynard decided upon the application made to him, that he has no power to open the judgment, and I think there can be no question as to the correctness of that decision. The fifth section of the act of 1859, for raising money by tax (*Laws of 1859*, 1127), merely authorizes the comptroller to take all proper and necessary means to open and reverse judgments obtained against the city by collusion, or which are founded in fraud. The Marine Court, when the act of 1859 was passed, had no power to open a judgment, unless it was obtained by default, nor to reverse one, except upon an appeal to the general term of that court, and there is certainly nothing in the clause quoted from that act, giving to the Marine Court any such power. By the filing of a transcript of the judgment with the county clerk, it became, for the purpose of enforcing it against both real and personal property, a judgment of this court, and execution thereafter could issue only out of this court. (*Sholts v. Judges of Yates County*, 2 *Cow.*, 506.)

The Code (§ 68) declares that when the transcript is docketed it shall have the same effect as a lien, and be enforced in the same manner as, and be deemed a judgment of the Court of Common Pleas. We have never understood the words “and be deemed,” introduced by the amendment of 1851, as giving us the same power that we have over one of our own judgments of opening it, allowing a party to come in and defend, or setting it aside for good cause. When we open one of our own judgments, the cause continues in this court, and we have control of it, until it is again finally disposed of. Upon setting aside a judgment, the parties are placed in the position in which they were, before the judgment was recovered; but if a judgment transferred to this court by the filing of a transcript is set aside, there is nothing more remaining in this court. The judgment of the court below still stands; and the Legislature have not indicated how, or in what way, the cause could be heard again. By the act of 1853, specific authority is given to the Marine Court to open judgments obtained by default, showing very clearly that the Legislature intended, when the discretionary power of opening a judgment was to be exercised, that it should be exercised in the court where the previous proceedings have been had. We understand the amendment of 1851,

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therefore, as meaning nothing more than that the judgment is to be deemed a judgment of this court, simply for the purpose of being enforced against both real as well as personal property; the words "shall be deemed," may have been thought necessary to prevent any question arising as to the validity of titles to real estate derived from sales made under such judgments. We undoubtedly have control over it, as we necessarily possess the power of staying proceedings upon the execution, and there is sufficient in the affidavit of the comptroller to invoke the exercise of our discretionary power.

But the defendant denies that there has been either collusion or fraud, and swears that he rendered the services for which judgment has been obtained. If we were, as requested, to enjoin the plaintiff perpetually from enforcing the judgment by execution, we should cut him off from all opportunity of repelling the imputation of fraud or collusion, or of establishing the validity of his claim.

In a case so peculiar as this, I suppose the proper course would be, to enjoin the plaintiff from proceeding to enforce his judgment, but without prejudice to his right to bring an action upon it in a court of record. In such an action the defendants could apply for such affirmative equitable relief against the judgment as they may be entitled to. They could, by way of defence to the action, obtain all the relief which, in analogous cases (*Floyd v. Jayne*, 6 *Johns. Ch.*, 479; *Livingston v. Hubbs*, 2 *Ib.*, 512; *Bissell v. Bogman*, 2 *Dev. Ch.*, 160; *Matter of Hemiup*, 2 *Paige*, 317; *Colt v. Cornwall*, 2 *Root*, 109), was obtained before the Code by a bill in equity. (*Arndt v. Williams*, 16 *How. Pr.*, 244.) To this extent, therefore, the motion is granted.

The other three cases being in all respects like this, the same disposition is made of the motions in these suits.*

* The order settled and entered in each and all of the above cases is as follows: After reciting the various motions and proceedings as above set forth, it provides:

"That each and all of the said plaintiffs in the above-entitled actions respectively, and all others claiming by or under them, or any of them, be, and they are hereby perpetually enjoined and restrained from proceeding to enforce the aforesaid judgments, and each of them, by them obtained against the said defendants, by any process or proceeding whatever, except by bringing suits on the

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Court of Appeals; November Term, 1860.

ATTORNEYS.—ADMISSION TO THE BAR.—APPEAL.—CONSTITUTIONAL LAW.

Where any power is conferred upon a court of justice to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of the court may be regarded as *judicial*, irrespective of the original nature of the power.

Whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such application must be regarded as *judicial*.

An application for admission to practise as an attorney, is a remedy of the class of special proceedings; and an appeal lies to the Court of Appeals from an order of the court denying such application.

The statute of 1860,—providing that any graduate of the Law School of Columbia College shall be admitted upon his diploma to practise,—is not unconstitutional. On a fair construction, it has reference only to the requisite qualifications of learning and ability, and does not necessarily assume to dispense with the constitutional requirements as to age, sex, &c.

The power of the Supreme Court over the admission of attorneys, is not beyond the control of the Legislature.

An admission of attorneys is not appointment to office within the meaning of the Constitution.

Appeal from an order of the Supreme Court, denying an application of the graduates of Columbia College Law School, for admission to practise as attorneys.

By the act entitled “An act relative to the Law School of Columbia College,” passed April 7, 1860, it was enacted, that the professors in the Law School of Columbia College, and the law committee of the trustees of said college, are constituted

said judgments in a court of record; and that in such suits the defendants be at liberty to set up by way of defence thereto, any matters that might have been interposed as a defence to the said actions, and each of them, before the judgments were therein obtained as above set forth.”

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a committee, any three of whom, being counsellors at law, shall form a quorum, upon whose examination and recommendation, as evidenced by the diploma of said college, granted upon such recommendation, any graduate of said Law School shall be admitted to practise as an attorney and counsellor at law, in all the courts of this State; and that no diploma shall be sufficient for such admission, which is given for any period of attendance upon the said school for a term less than eighteen months; but this period of eighteen months shall not apply to the members of the present senior class in said Law School, who may be admitted to practise as aforesaid upon the examination and recommendation of said committee, and upon the evidence of the diploma of the college.

Under this act, several graduates of the Law School applied to the Supreme Court in the first district to be admitted to practise.

An application of the graduates of the Law School of the New York University was made about the same time, under a similar statute relating to that institution. Both applications were denied. The opinions of the court are reported, 10 *Ante*, 387. From the orders entered, appeals were taken to the Court of Appeals. That in the case of the Law School of Columbia College was argued by

Theodore W. Dwight, of the faculty of the Law School.
I. The order is appealable.

1. This motion is a proper remedy. This would be so at common law. *Ubi jus, ibi remedium*. There is no distinct remedy by action which would clothe the appellant with the right to practise. A mandamus will not lie to the Supreme Court. Besides, as an admission to the bar by the court is a judicial act (see *Commonwealth on rel. Brackinridge v. Common Pleas*, 1 *Serg. & Rawle*, 187; *Exp. Secombe*, 19 *How. (U. S.)*, 15), a mandamus cannot, on recognized principles, be granted. There is no way in which the appellant can be admitted, except by an order of the court. An application for an order is a motion. Attorneys are admitted upon motion by the court. (*Exp. Stokes*, 1 *Chit.*, 556; *Exp. Rowle*, 2 *Ib.*, 61; *Laws of 1847*, ch. 280, § 75.) However this may be at common law, this motion is a remedy under the Code. Every

original application to a court of justice for a judgment or an order is a remedy. (Belknap *a. Waters*, 1 *Kern.*, 477.)

2. This is a special proceeding. It cannot be an action. (Hyatt *a. Seely*, 1 *Kern.*, 52; Belknap *a. Waters*, *Ib.*, 478.)

3. The order is therefore appealable under section 11, subdivision 3, of the Code. It is an actual determination of the court. Whatever the court does in that capacity is judicial. (Matter of Canal and Walker streets, 2 *Kern.*, 406.) A statute may confer a power upon a court, which it will at once proceed to exercise in the same manner as it exercises jurisdiction granted by the Constitution. It uses all the ordinary machinery of the court in such a case; requires the services of its officers and the buildings appropriated to its ordinary business. The powers incident to its general jurisdiction, so far as applicable, attach at once to the new subject. (*Ib.*, 411.) An admission to the courts is clearly a judicial act. (See the cases previously cited from Chitty, also 2 *W. Black.*, 734; *Exp. Smith*, 7 *Dowl. & Ryl.*, 382; 1 *Serg. & Rawle*, 187, 193, 195.) The order of admission becomes a record, and of so high a nature, that the only way of testing it is by the plea of *nul tiel record*. (*Merrifield's Law of Attorneys*, 29.)

Section 75 of the judiciary act expressly provides that a candidate, applying to be admitted to practise, shall be examined by the justices of the Supreme Court at a general term thereof; and if found qualified, &c., the court shall direct an order to be made by the clerk thereof, stating that such person has been so examined and found to possess the qualifications, &c. The admission takes place by the court, in its ordinary course of action; it requires the services of its officers; the order is to be entered by the clerk in the usual way.

The act of 1860 is *in pari materia* with the judiciary act, and must be construed in connection with it. The admission is, to all appearances, to take place in the same manner. The court, in hearing this motion, in rejecting it, and in directing an order to be entered to that effect, manifestly acted as a court. Moreover, in the present case, the court expressly assume to act as such, and rest the denial of the motion upon the ground that there is not sufficient legal evidence before them. The act, moreover, makes the diploma evidence, showing the matter to be judicial.

The order made is final, and disposes of the whole subject.

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The Constitution, the judiciary act, and the law of April 7, 1860, show that a right has been affected. A person having certain qualifications is entitled to an admission to practise in all the courts of this State, and has, therefore, a right to be admitted. Wherever a court is bound to decide *ex merito justitiae*, error will lie. (*Evans v. Adams*, 3 *Green*. (N. J.), 373.)

This right is substantial. The appellant has rights under the law of April 7, 1860, which he has not under the judiciary act alone, and under the rule of the court. Under the law, he can be admitted at any time; under the rule, only during two terms of the year. Under the rule, he can only make his application in the district where he resides; under the law, he can be admitted in any district. If the decision be not reversed, he must lose, for six months, the right to practise.

Striking an attorney off the roll, without cause, cannot be distinguished, in principle, from refusing to admit one who shows himself entitled to an admission. A writ of error will lie in favor of an attorney who has been wrongfully removed from office by the court below. (*Strother v. The State*, 1 *Missouri*, 605; *Exp. Secombe*, 19 *How.* (U. S.), 15.)

If this order be not appealable, a law may be pronounced unconstitutional on motion, without argument, and its effect nullified without any opportunity for review. The decision that a law is unconstitutional, is clearly an exercise of judicial authority. (*Thomas v. Board of Commissioners*, 5 *Indiana* (Porter), 4.)

Since this decision, the appellant cannot assume to act as an attorney, without an apparent contempt of court; nor can it be perceived how, by the very terms of the act, he can proceed without being admitted to practise.

The right of review being fundamental, is always presumed to exist. Even if there be an intention to take it away, it must be expressed with irresistible clearness. (*Lawton v. Commissioners of Highways*, 2 *Cai.*, 179-181; 3 *Hill*, 464, per COWEN, J.; *Starr v. Trustees*, 6 *Wend.*, 564.)

The rules of the common law cannot be followed strictly, since the Code, in determining the right of appeal. The only question is as to the meaning of the statute or Code. The former test, as to whether the proceedings were according to the course of the common law (*Case of Cardiff Bridge*, 1 *Salk.*,

144-146; *Tidd's Pr.*, 1051), is no longer applicable. (Evans *a. Adams*, 3 *Green (N. J.)*, 373; *Belknap a. Waters*, 1 *Kern.*, 477.)

There are cases, however, which, in principle, hold that this case would be appealable at common law. Thus it has been said, "wherever a decision upon a motion disposes finally of the case, a writ of error will lie." (*Cavanaugh a. Titus*, 5 *Wisconsin*, 144.)

II. This order ought to be reversed.

1. At common law the court had no power to appoint an attorney or counsellor.

2. The rules regulating the appointment of an attorney are merely statutory. This appears from the history of the English law. In this State, in the colonial period, attorneys were uniformly appointed by the governor. Judicial decisions, in this country, recognize the English rule. The power of the Legislature may also be derived from the nature of the case. Whether there should be any regulations on the subject at all, and if any, what they should be, is a question of public policy which the Legislature alone is competent to decide. It will be shown that attorneys, since the first statutes, have been treated as public officers, and their appointment, as such, has been regulated by the Legislature.

III. The act in question, entitled "An act relative to the Law School of Columbia College," is not unconstitutional. The provision on the subject in the Constitution was inserted, not to confer power upon the court, but privileges upon the citizen. The Constitution expressly withdraws from the court the power to appoint public officers, among whom attorneys are included. All the power which the court now possesses is simply to ascertain the qualifications of an attorney, and to enter an order stating that they are ascertained. The act makes the diploma of the college evidence of the existence of these qualifications, which is within the power of the Legislature. The word admission, in the Constitution, means only the power of entrance, and confers no authority upon the court. The contemporaneous construction of this provision by the Legislature in the judiciary act, upholds this law. If unconstitutional, the practice of the Supreme Court in admitting to all the courts, is itself objectionable. It is not a nugatory thing to admit one who is entitled by statute to admission, the object of the formal act

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being to place his name upon the roll, to prove his title and to furnish the court with a more ready means of administering discipline. The clause in the Constitution affecting this question, was intended probably as a restraint upon the judiciary, and not upon the Legislature. If there be any objection to the law, because by its unguarded language it allows unqualified persons to be admitted (which is denied), it is only void to that extent.*

• The argument of the learned counsel upon this branch of the case embraces so exhaustive a view of the history and course of admission of attorneys, that we present it here at length.

I. The court, by common law, had no power to admit an attorney or counsellor to practise.

1. As to attorneys. It was the policy of the common law, in order that suits might not multiply and increase, that both plaintiff and defendant should appear in person in all actions, real, personal, and mixed, as well in courts of record as not of record. The old writs demanded that the defendants should appear, which was always in proper person. The justices sometimes allowed one to act for a party in his absence, provided that he was personally selected by such party in the presence of the court. Such a person was called a "*responsalis*." There was no restriction as to the character of this person. A father could respond for a son, a foreigner for a foreigner, a husband for a wife. (*Glanville de Legibus*, bk. 11, ch. 3; 1 *Reeves' Hist. English Law*, 169.)

Lord Coke calls especial attention to the difference between a "*responsalis*" and an attorney. (2 *Coke's Inst.*, 249, 250, commenting on the statute of *Westm.* 2d.)

While the justices could not permit a person to appear by attorney, the king, by the plenitude of his prerogative, might appoint an attorney, and give any person a right to appear in this manner. Letters-patent would issue out of chancery, or under the privy seal, commanding the justices to admit such and such a person as attorney for another, in regard to the particular suit in question. This is a very early instance of a royal mandamus to the courts, commanding the courts to admit attorneys, &c. The words were "*mandamus ut admittatis*." (See *Register of Writs*, 20-22; *Bacon's Abridgment*, tit. *Attorney*, par. 1.) These letters were usually granted for some special reason, such as absence and sickness, although the authority might be general, and was entirely at the pleasure of the king. (See *Co. Litt.*, 128, a, § 196; *Petersd. Abr.*, tit. *Attorney*.)

These writs continued to be used side by side with the statutes hereafter noticed. The Register contains a large number of forms of writs containing the words "according to the form of the statute in such case provided." One of them discloses a reason why they were applied for. The command is, that the justices admit the attorney "*sine difficultate*." The judges apparently resisted the command of the statute, and this writ was devised to overcome their objections.*

Besides, as will be seen, the statutes did not extend, at first, to many cases, and the writs supplied, in individual instances, the defects of legislation.

* Says Lord Coke: "Here is a secret in law, that, upon any statute made for the common peace or good of the realm, a writ may be devised for the better execution of the same, according to the force and effect of the act." (3 *Inst.*, 162.)

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BY THE COURT.—SELDEN, J.—This is an appeal from an order made at a general term of the Supreme Court, in the first judicial district, denying the application of the appellant to be admitted to practise as an attorney and counsellor at law, pur-

Sometimes two or more general attorneys were appointed by letters-patent, with power to substitute others in their places, and with power reserved to the client to revoke the appointment. Such persons were often appointed to act during the absence or sickness of the client; their authority ceasing on his return or recovery.

Heads of monasteries or religious houses were especially favored in this respect. One of the forms in the Register is so illustrative, that a translation of it is subjoined:—"The King, &c., to all to whom these presents may come, Greeting. Know Ye, that, whereas the lands and tenements of the Abbey of St. Peter of Gloucester lie in different counties of our realm, and far from the Abbey, and that frequently the Abbot is greatly entangled in lawsuits and vexed in different courts in said counties, by persons plotting to annoy him with labors and to overload him with expenses, because the said Abbot, on account of the distance of the lands and the dangers of the roads, cannot struggle through the prosecution of controversies concerning them without the greatest personal risk, and without ruinous cost, we having considered the premises, and wishing to do a special favor to the aforesaid Abbot,—cherishing, as we do, a spiritual affection for the church where our father Edward of blessed memory lies buried,—for ourselves and our heirs, grant to such Abbot for the whole time of his life, the power to make and constitute general attorneys for prosecuting and defending all pleas and complaints which may be moved for or against him in any courts whatever, and that the said attorneys, or any one of them who may be present, may make whomsoever they wish attorneys for prosecuting, and defending, &c.; and the said Abbot may remove the general attorneys so appointed, as often as he may see fit, and appoint others. Let not this concession of ours be drawn into a precedent. By the King himself." (*Register of Writs*, 22.) This writ is especially interesting, as showing how corporations originally appeared, and how it happened that they appeared by attorney. The "special favor" alluded to in this writ was often exhibited, as there are fifteen different forms of showing it forth to be found in the Register.

This writ shows clearly that such an attorney was simply an attorney in fact.

It may be conjectured that the statutes, to be hereafter noticed, allowing attorneys, were passed to prevent the delays which were so common in ancient lawsuits. The distance of the land, the dangers of the road, the inconvenience of travelling, were all reasons why the old rule, which required the presence of the client at court, should be dispensed with. As soon as attorneys were allowed, there was no excuse for delay. Accordingly, in the first statute upon the subject, it was enacted that the previously recognized legal excuses for absence from court should be hereafter abrogated, and unless the tenant was present by attorney, the case should go by default. (*Statute of Westminster* 1st, ch. 42.)

In the absence of letters-patent, it is clear that attorneys could not exist at common law. Says the *Mirror of Justices*, "it is an abuse to have an attorney, except by writ, out of chancery." (No. 100 of *Abusions of the Law*.) Lord Coke adopts the sentiment. (2 *Institutes*, 250.)

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suant to the provisions of the act relative to the Law School of Columbia College, passed April 7, 1860; and the first question to be considered, is whether an appeal will lie to this court from such an order.

2. Barristers or counsel were not, at common law, nor are they now, in England, admitted by the court. The barrister went to the bar by means of authority granted by the Inns of Court, which were voluntary associations and unincorporated. The judge could not require the benchers to add any persons to their number unless they saw fit, nor could barristers be created, as attorneys often were, by letters-patent. (*Pearce's Inns of Court*, 60. See *Fortescue de Laudibus*, Ainos. ed., 182-188; 4 *Reeves' Hist. English Law*, 573, 574.) The Inns of Court resolved, at an early period, not to admit any attorneys to the degree of barristers, and to dismiss barristers if they practised as attorneys. (*Ib.*) The barrister assumed his gown without the acquiescence of anybody but the house to which he belonged. (*Pearce*, 52.) The discretion of the societies in admitting barristers is understood to be uncontrollable. (*King v. Benchers of Lincoln's Inn*, 4 *Barnwell & Cresswell*, 855.) It is well known that these associations have continued, down to the present day, to admit barristers, with a greater or less degree of stringency in the examinations. They are now sensibly increasing the requirements necessary for an admission. From them can be derived a commentary, running through a period of half a dozen or more centuries, upon the proposition that the qualifications of counsel can be ascertained without applying to the court to test their fitness.

II. The power of clients to appoint attorneys, and of the court to regulate their admission, is statutory in its character.

This will appear, 1. Historically. The power of clients to appoint their attorneys was conferred in England by Statute Westminster 2d (3 Edw. I., ch. 42), in certain cases. The object of this legislation was to confer the right to appear by attorney without applying to the king. In this way the king gave up fees which he used to possess, when he could command the justices to admit an attorney. (2 *Reeves' Hist. English Law*, 169; 2 *Coke's Institutes*, 377, 378; *Statute Westminster* 2d.) These acts extended to corporations by force of the word "illi" or "they;" the language of the act being that *they* who have lands, &c., in litigation, may make an attorney. (2 *Coke*, 378.) In those cases to which the statute and succeeding acts did not extend, the courts were very rigid in applying the former rule. In the first act, three cases are mentioned, but one quite important was omitted—the action of novel disseizin, as it was termed. By 12 Edw. II. (ch. 1), it was enacted that the tenant in possession might appear by attorney in that action. In the Year Books (21 Edw. III., 41), a curious case is reported. The defendant appeared by attorney. Said SERON, J.—How can you appear by attorney, when you have nothing in the tenancy? Counsel.—It is the common course, whether one is demandant or tenant. HILL, J.—At the common law, neither tenant nor demandant could appear by attorney, but only by bailiff. By statute it is ordained that a tenant can appear, but it is not ordained that a demandant can. The attorney was therefore excluded. *Beecher's Case* (8 *Coke*, 58), as well as many cases in the Year Books, hold it to be incompetent for a party to appear by attorney in a case to which the statutes did not extend. Judgment would go by default against a person who appeared in this manner without the authority of the

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It is suggested, as an objection to the appeal, that such an application is not a judicial proceeding; that the power of appointing or admitting attorneys and counsellors is executive or administrative, rather than judicial, and might be conferred

statute. In a case of detinue (*Year Book*, 9 Edw. III., 6), a party lost his case by appearing by attorney. (Also, Edw. II., 18.)

It was a well-recognized rule that parties could not appear by attorney where any personal service was to be expected; as, for instance, homage. (*Year Book*, 1 Hen. VII., 27.) This same principle, curiously enough, is found in the Laws of 1801, in this State. A party could not appear by attorney where corporal punishment might be inflicted as a result of the proceeding.

The character and qualifications of an attorney were not at all involved by these statutes. He was simply an attorney in fact. Any one could, by legal principles, be an attorney. The king might send a message to the court to receive such person as the party may name (*Fitz. N. B.*, 60, 61), and might make the grant either under his privy seal or great seal. The courts say in one case (*Year Book*, 21 Hen. VI., 30, in the Common Pleas), that by the rules of law an outlaw or an attainted clerk may be an attorney in a suit, though such persons could not themselves bring actions. The reason why they could appear as attorneys, was because they sued in *autre droit*. This case is so important, that it is stated somewhat at large. An action of debt had been brought by administrators. The defendant, by his counsel, said that he ought not to answer, because the plaintiffs were outlaws, as he could prove by the record. After a discussion by plaintiff and defendant, Newron, Ch. J., said, "Put the case that an executor is an outlaw; this does not deprive him of his right to administer upon the estate of the deceased, for an executor is, as it were, an attorney for the dead. And put the case that I sue a suit in this court by attorney, and he were an outlaw; this would be no plea against his right to proceed; or if an infant, by his *prochein ami*, should bring an action, it would be no defence that the *prochein ami* was an outlaw, because in both cases they sue in *autre droit*." Paston, J., conceded this proposition; and Fulthorpe, J., while admitting its truth, held that the case of an executor was not parallel to that of an attorney. The Index states that an outlaw or an attainted clerk may be an attorney. This case shows that it was perfectly understood that an attorney merely stood in the place of his principal, like a *prochein ami* for an infant, and accounts for the fact that the old appointments made by the king usually allege absence from the realm, sickness, and engrossing occupations, as a reason for the selection. The attorney was appointed on account of a disability on the part of his principal. The case of an attorney must have been exceedingly clear, or Justice Newton would not, in endeavoring to set forth the power of an executor, have resorted to an analogy so imperfect as to call him an "attorney for the dead."

A married woman could be an attorney for her husband in a suit. (*Fitz. N. B.*, 63.) Attorneys were appointed by authority emanating from their "master" (3 *Reeves' Hist.*, 233), as the client was then called, and by warrant of attorney. This warrant must be produced as early as the day of trial, or else it was a case of error. (8 Hen. IV., 62.) An attorney could never plead the misnomer of his master, contrary to the warrant, but might plead that he had an additional name. (2 Hen. VI., 11; 3 *Ib.*, 55.) In many kinds of actions the warrant of attorney,

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upon any other branch of the government as well as upon the judiciary. It is urged, therefore, that the action of the courts, in the exercise of this specially delegated power, cannot be regarded as of a judicial nature, and hence that no appeal will lie.

even after the statutes, must be made by the client in court in proper person. Thus in 7 Edw. IV. (9, A), one came to LITTLETON, J., in a case of writ of right, and prayed that he would receive him as an attorney. Said Littleton, "Where is he who would make you an attorney?" The attorney replied that he could not come, &c. Said Littleton, "If he does not come in proper person, we cannot receive you."

That attorneys were simply agents, is shown by the fact that two or more were often appointed jointly and severally, *conjunctim et divisim*. (12 Hen. VII., 9.) In this case a very learned and lengthened discussion arose as to the effect of the act of one without the knowledge or consent of the other.

After attorneys were allowed, as a matter of right, and without limit, a vast number of worthless and ignorant men naturally came before the courts. Lord Coke tells us that the introduction of attorneys was a great and lamentable innovation upon the common law. (2 *Inst.*, 250.)

The king, for a time, by his own royal will, attempted to regulate the matter. In 20 Edw. I., he directed the justices to provide and appoint, according to their discretion, attorneys in every county. Seven score he thought enough for all England, but the justices, in their discretion, might increase the number. Reeves regards this ordinance as having first conferred upon them the right to practise. (Vol. 2, 285.) In the reign of Edward II., the power was taken away from every one but the chancellor and chief-justices, thus showing that the matter was regarded simply as an appointment to office. The idea that attorneys held office, undoubtedly grew out of the limitation of their number in the ordinance of King Edward I.

These measures, however, did not reach the evil. The Legislature passed, in the reign of Henry IV., the model act upon this subject, from which all subsequent legislation has derived an impress. (2 *Inst.*, 215.) This act, after reciting, in the preamble, the mischiefs growing out of the former system, proceeds as follows:—That all attorneys shall be examined by the justices, and that by their discretion, their names shall be put upon the roll, and that they be good, virtuous, and of good fame, and be received and sworn well to serve in their offices. And the other attorneys shall be put out by the discretion of the justices, and if any of the attorneys do die, the justices shall make another in his place. (4 Hen. IV., ch. 18.) Even after an attorney was stricken off the roll, the king could send him back again by letters-patent. (20 Hen. VI., f. 37; 2 *Coke's Inst.*, 215.) By the terms of the act, the attorney, in such a case, was made to take an oath that he would not practise any longer. (4 *Coke's Inst.*, 101.) Before this statute no regulations had been made, either to define the qualifications for an attorney, or to point out who should be at liberty to undertake the office. (*Maugham's Law of Attorneys*, 9; *Dawson's Law of Attorneys, Introduction*, 7.) This statute is very important, both for what it enacts and what it discloses. It shows that an attorney at that time held an office; that no system of testing attainments or character existed; that there were attorneys who were not examined, and who were not good, virtuous, or of good fame. Attorneys now, for the first

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It must be conceded that this objection, if well founded, in respect to the nature of the order appealed from, would be fatal to the appeal. It is indispensable to the validity of an appeal to this court, that it be from some judicial determination of the

time, go on the roll; they become attorneys of record, and cease to be mere attorneys in fact. (See 1 *Roll*, 3.) Crabb (*Hist. English Law*, 351) says, that the placing attorneys upon the roll was a new measure, now found necessary. This statute does not appear to have been at first strictly followed by the justices. Coke (4 *Inst.*, 76) laments the increase of attorneys beyond the number allowed by law. He says, "Concerning attorneys, the number is set down, and that they ought to be learned and virtuous; and, as I understand, the judges, at this time, have this matter in consideration." The act must evidently be regarded as restrictive, and as interfering with common-law rights. It can only be defended upon grounds of public policy.*

It is, therefore, evident that the qualifications are simply statutory, and their ascertainment might have been lodged with any other body of men. It was given to the courts as a matter of convenience. It was an appointment to office given in the same way as that of sheriff, coroner, and justice of the peace. Sheriffs began to be appointed by the justices in the reign of Edw. II. (2 *Reeves' Hist.*, 297.)

That the Legislature viewed the matter in this way, and regarded it as under their control, is evinced by a great variety of statutes. These may be classified as statutes: *a*, restricting the right to practise; *b*, restricting, arbitrarily, the number of attorneys; *c*, enlarging the right to admission; *d*, statutes for the government of attorneys.

a. By 3 James I. (ch. 7), it was enacted that no attorney shall be admitted in the king's courts but such as are brought up in the same courts. This was adopted, as was said, to avoid the infinite number of solicitors and attorneys.

b. Several Parliaments passed statutes decreasing the number of attorneys. (2 *Coke's Inst.*, 250.) By 33 Hen. VI., the number of attorneys in several counties was limited. There were to be six in Norfolk, two in Norwich, to be admitted by the chief-justices, and any who practised without admission were to be subject to penalties. (8 *Reeves*, 284; *Barrington on Statutes*, 20, note *d*.)

c. Enlarging the right to admission. By 6 & 7 Victoria (ch. 73, § 27), attorneys admitted in any one of the Superior Courts may practise in any other Superior Court. Examiners may be appointed by either of the common-law or equity courts, upon whose certificates attorneys may be admitted in all the courts. It may be said, in passing, that the fact that a statute authorizing the appointment of examiners was deemed necessary, would seem to throw a doubt upon the practice that sometimes exists, of appointing examiners by the court without any

* The details of this statute appear to have been copied from French and Roman legislation. By a royal ordinance in France, sixty years before (March 3, 1344), those who were admitted as advocates were obliged to take an oath, their names were incribed upon a roll; while those who were not fit for the profession, were stricken off the roll, or "excommunicated," by the other members of the order. The Roman emperors required an admission or formal examination of the candidate by the governor of the province, on the certificate of law professors with whom the candidate had studied. When an advocate died, another was appointed in his place. (*Dupin's Profession d'Avocat*, 26, 50-53.) It was very common in early times when a regulation was made in England, that the same was adopted in France, and *vice versa*. (*Barr. on Stat.*, 130, 199; 1 *Reeves' Hist.*, 54.)

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court below. But is not the proceeding here judicial? Although, in the general distribution of powers and duties among the great departments of the government, many are found the characteristics of which are so marked, that they can with cer-

statutory provision to that effect. The passage of the act shows how sensitive the English courts are in regard to any assumption of original power in the case. The control of Parliament over this subject is strikingly shown by the recent legislation in regard to the Court of Probate and the Court of Divorce. 20 & 21 Vict. (ch. 85, § 15), enacts that all attorneys and solicitors entitled to practise in common law or equity, shall be entitled to practise in the Court of Divorce. Section 63 requires the payment of a stamp-duty on admission.

20 & 21 Vict. (ch. 77), establishes the Court of Probate. Sections 40-45 enact that all attorneys and solicitors are entitled to practise in the Court of Probate, and the laws governing them are extended to them in their character of proctors.

Great light is also thrown upon this subject by the amendment act of 21 & 22 Vict., ch. 108. By the original act, no power had been given to the Court of Divorce to punish attorneys for misconduct. An express section (15) is provided for that purpose in the amendment act. This could have only been inserted on the view that otherwise the court would have no power to discipline attorneys.^o

d. Rules for the government of attorneys will be found in 12 Geo. I., ch. 29, § 4. It appears that it had been common, previously, for attorneys to continue to practise, notwithstanding a conviction for perjury and forgery. Reference is also made to 21 & 22 Vict., ch. 108, § 15, before alluded to.

In our own State, before the Revolution, the power of appointing attorneys was exercised by the governor of the colony. These appointments are recorded in the Books of Commissions, and may be found in the office of the secretary of state. The first license recorded bears date, Nov. 15, 1709, and was granted by Gov. Ingoldsby. Appointments were undoubtedly made at an earlier period. The last appointment was made by Gov. Tryon, March 11, 1776, who issued, on that day, the last commission of any kind signed by a colonial governor. On the very next page, and without even the shelter of a blank-leaf, behind which to conceal our surprise, "the people of the State of New York, by the grace of God, free and independent," make their first appointment of a secretary of state.

The form of the license granted to an attorney was like the one subjoined, except that usually there was no restriction as to the counties in which the appointee should practise. The original commission may be found in the Law Institute in New York. The following is a certified copy, furnished by the kindness of the assistant-librarian, Mr. Tillinghast:

L. S. } John Montgomerie, Esq., Captain General and Governor-in-
GARDE BIEN. } chief of the Provinces of New York, New Jersey, and Terri-
tories thereon depending in America, and Vice Admiral of the same—

To all whom these presents shall come, or may concern :

* Since this argument was made, a statute has been passed in England (2 and 3 Vict. ch. 127), enacting that all previous attorneys of the court of the county of Lancaster should be admitted to all the courts of Westminster Hall. It allows the judges to institute a preliminary as well as an intermediate examination, in order to test the qualifications and ascertain the progress of candidates for admission. It also contains a provision, making it a contempt of court for any person to practise as an attorney without being admitted.

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tainty be referred to the appropriate department, yet this is by no means the case with all. The lines between the various departments are not and cannot well be very precisely defined, and there are many duties which may be, with equal propriety,

Know ye, that being well assured of the ability and learning of Edward Collins, Gentleman, have thought fit to constitute and appoint him an attorney at law, hereby authorizing him to appear in all his Majesty's Courts of Record, in the city and county of Albany, in the county of Ulster and Dutchess, within the province of New York, and there to practise as an attorney at law, according to the customs and laws of Great Britain, and customs and laws of said province, and all Judges and Justices, and others concerned, are hereby required to admit him accordingly. Given under my hand and seal at arms, at Fort George, in New York, this 18th day of July, in the second year of his Majesty's reign, Anno Domini 1728. By his Excellency's command. J. MONTGOMERIE.

J. S. BOBIN, D. Sec'y.

In some cases the licenses were granted to practise in a single court, as in the inferior courts of Common Pleas of Cumberland county. In other cases, in two or more counties.*

It would appear, from a passage in Smith's History of New York, that the governors usually took advice from the chief-justice of the Supreme Court, as to whom they should appoint. But he laments that at times they licensed all applicants, how indifferently soever recommended. (*Hist. of New York*, 382.) The whole passage shows that the appointment of an attorney was wholly discretionary with the governor. He doubtless derived his power from that clause in his own commission from the king, which ran as follows:—"We do hereby authorize and empower you to constitute and appoint judges, and in cases requisite,

* The following statement indicates the general results of the Books of Commissions:

There were licensed by the colonial governor, during sixty-eight years preceding the Revolution, one hundred and thirty-six attorneys. During the first eight years, three, to practise in all courts of record.

From 1717 to 1726, both inclusive, eight, to practise in all courts of record.

From 1727 to 1736, both inclusive, six, to practise in all courts of record, excepting in three instances the Mayor's Court of New York.

From 1737 to 1746, both inclusive, three, to practise in all courts of record.

From 1747 to 1756, both inclusive, twenty three—fifteen in all courts of record and eight in inferior courts of Common Pleas.

From 1757 to 1766, both inclusive, thirty-three—twenty-five of record and eight in inferior courts.

From 1767 to 1776, both inclusive, sixty—thirty-seven of record and twenty-three in inferior courts.

If we examine the number of attorneys admitted to all courts of record, we have—

In the first eight years, three;

In the decade succeeding, eight;

" " " six;

" " " three;

In the decade succeeding, fifteen;

" " " twenty-five;

" " " thirty-seven;

making, in all, the number of ninety-seven attorneys admitted to full practice in sixty-eight years.

We can but wonder, in view of the smallness of their number, at the complaints made by Gov. Colden to the Earl of Halifax, in his letter of Feb. 22, 1765, where he speaks of the dangerous influence which the profession of the law had obtained in this province more than in any other, and wishes that the "people were freed from the domination of the lawyers." It would seem that the Books of Commissions cannot contain the names of all the practitioners.

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referred to either. Duties of this class, and they are very numerous, necessarily take their character from the departments to which they are respectively assigned. The same power which, when exercised by one class of officers not connected

commissioners of oyer and terminer, justices of the peace, and other necessary officers and ministers in our said province, for the better administration of justice, &c."

Such a license being produced in court, the oaths and subscription were taken, and the attorney was qualified to practise in every court of the province. (*Smith's Hist. of New York*, 382; *Street's Council of Revision*, 84.)

There is a provision in the city charter of New York, granted during the time of Gov. Montgomerie, Jan. 15, 1730 (see *Kent's City Charter*, 74, § 30), which furnishes valuable information upon this subject. A court of record having been established by the charter, in the city of New York, of which the mayor, recorder, and aldermen were to be judges, the thirtieth section proceeds:—"We do hereby constitute, name, and appoint James Alexander, Joseph Murray, John Chambers, William Smith, George Lurting, William Jamison, Richard Nichols, and Abraham Lodge, gentlemen, to be the present attorneys, and each of them to be an attorney of and in the said court of record, for and during the good behavior of each of them respectively; and we do hereby, for us, and our heirs and successors, grant and ordain that no other attorney or attorneys whatsoever, besides the aforementioned attorneys, during the time that they shall all remain attorneys of said court, shall be permitted or suffered to practise as an attorney of or in the said court." In the latter part of the section, rules are provided for the government and discipline of these attorneys by the court. The action of the court is, in every case, subject to the approval of the governor. Of the gentlemen above named, some had been previously admitted attorneys. Abraham Lodge was not admitted to other courts of record until July 30th, afterwards. (See *Book of Commissions*, July 30, 1730.) He is, therefore, constituted an attorney in this court, by mere force of the charter, and without any admission. Chancellor Kent justly says, in note 43 to this section, that this is a remarkable instance of professional monopoly.

That this section of the charter was observed in practice, is shown by the fact that almost all licenses to practise in the inferior courts throughout the residue of the colonial period, expressly except the Mayor's Court of New York. Thus John Colden was appointed July 20, 1750, an attorney in all the inferior courts in the State, &c., except the Mayor's Court of New York, and a similar license was given to Bryan Leftery, February 4, 1773. On the other hand, Richard Varick was commissioned April 6, 1774, as an attorney in the Mayor's Court of New York, and in October of the same year, in all the courts of record in the State.

The general correctness of this historical outline is shown by the statement of the Supreme Court, in the case of *The People v. The Justices of Delaware*. (1 *Johns. Cas.*, 182.) The court says: "In our own State, before the Revolution, the power of appointing attorneys was exercised by the governor of the colony. His power was recognized by the courts, and the attorneys were admitted to practise."

When the State organization was effected by the Constitution of 1777, the power to appoint attorneys was vested in the courts. (§ 27.) The provision was very special, and provided that all attorneys, solicitors, and counsellors at law shall be appointed by the court, and be licensed by the first judge of the court in which

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with the judiciary, would be regarded and treated as purely administrative, becomes at once judicial when exercised by a court of justice. This is shown by the definitions uniformly given of the word judicial. Webster defines it thus: "Per-

they shall respectively plead and practise. (*Const.*, § 27, last clause.) By a further provision they are to be regulated by the rules and orders of the said court. The word appointment is noticeable as indicating the fact that an attorney was considered as holding an office. Statutes followed, indicating what steps should be taken in regard to the qualifications, oaths, and removal of attorneys. (20th February, 1787; 20th March, 1801; *Rev. Laws of 1813*, 1, 416.) In the case of Thomas Addis Emmett, the court held, in the presence of this constitutional provision, that they had no power to exact any oaths of counsellors which were not prescribed by statute. (2 *Cai.*, 386.) The court remarked that the act of this State upon this subject in existence at the time, was borrowed from 4 Henry IV., c. 18. Alienism was, therefore, held to be no bar to admission.

The Constitution of the State in 1822 is silent upon the subject of attorneys. The consequence is, that, after its adoption, the right of the court to admit attorneys rests wholly upon statute.

This subject was thereupon provided for in the Session Laws of 1823 (c. 182, § 19), requiring attorneys to be licensed by the courts in which they practise. The general provisions of this law were incorporated into 1 Revised Statutes, 108, 109; and 2 *Ib.*, 187.

It will thus be seen, if this view is right, that at the time of the adoption of the Constitution of 1846, the subject of licensing and admitting attorneys was wholly in the discretion of the Legislature. The matter had been disposed of in England in various ways. First, there had been no attorneys of court, then an admission *pro hac vice*, or generally was obtained by the king's license; then the Legislature had allowed attorneys in a few cases, and steadily increasing the number, had included nearly all; at first any one could appear as attorney, no matter what his character; in the beginning the king, and then the Legislature, had established rules for admission, now severe and restrictive, at other times easy and liberal; and again, Parliament had enacted that persons should be attorneys without examination.

In our own country there was first the governor's license; then constitutional restrictions; next the constitutional restrictions were removed, and the whole subject was left open to legislative discretion. If any matter was ever one of pure legislative action it must surely be this. Decisions in this country rest the power to govern and discipline attorneys solely upon statute. (*Missouri v. Foreman*, 8 *Mo.*, 602; *Smith v. State of Tennessee*, 1 *Yerger*, 228.)

2. What appears so plain historically, is also evident upon grounds of public policy. The regulation of the legal profession stands precisely upon the same principle as that of medicine. It is solely a question of public policy whether these professions shall be open or closed.

The same principles should govern a Legislature, as control them in prohibiting the sale of lottery tickets and in licensing taverns. This point is fully examined in *Jordan v. Overseers of Dayton* (4 *Ohio*, 308), where these principles are applied to the right of the Legislature to control the practice of the profession of medicine, and the court liken it precisely to the case of attorneys at law.

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taining to courts of justice, as judicial power;" and again, "proceeding from a court of justice, as a judicial determination." In Bouvier's Law Dictionary, it is defined as follows: "Belonging to, or emanating from a judge as such, the authority

8. Again, an attorney is clearly a public officer ever since the statute of Henry IV., and as such, in the absence of any constitutional restriction, the mode of his appointment may be regulated by the Legislature. The authorities sustaining this point will be noticed hereafter.

III. The act of April 7th does not conflict with the Constitution of 1846. This appears from the following reasons:

1. The act is within the proper scope of legislation, as has been already shown. The Legislature has, as has been seen, the right to control the subject, unless restricted in the Constitution itself.

2. This matter does not come within the general clause of the Constitution conferring jurisdiction upon the courts. "There shall be a Supreme Court, having general jurisdiction in law and equity." (*Const.*, art. 6, § 3.)

a. It was not originally a judicial subject, but legislative.

b. It does not follow because power has been delegated by the Legislature to courts of law, that it is judicial in its character. This is not a case between party and party, nor is it a decree affecting the title to property, which seem to be properly judicial. (*Rice v. Parkman*, 16 *Mass.*, 326.)

c. Nor does it follow because judgment is exercised in regard to a subject-matter, that it is in its own nature judicial. Judgment may be exercised, and yet the act may not be strictly judicial. Thus the Constitution provides that the Legislature may pass special acts of incorporation, when in their judgment the object of the corporation cannot be accomplished under general laws. No one imagines that this is an instance of judicial power, 'So when an inferior officer is removed by a superior for cause. Errors when committed in such cases cannot be usually reviewed, see *Mosier v. Hilton* (15 *Barb.*, 657); *United States Trust Co. v. Brady* (20 *Ib.*, 119, said to be affirmed by Court of Appeals, 30 *Ib.*, 39), except where authority is conferred upon a court as such, and its due exercise can be claimed by some person as a matter of right, and the ordinary practice of the courts furnishes means for the correction of the mistake. This power may be exercised by the court in its judicial capacity, though in its own nature it may not be strictly judicial. This principle is recognized in the Matter of extending Canal and widening Walker streets. (2 *Kern.*, 406.) The court deals with jurisdiction conferred by legislation in the same manner as though it were granted by the Constitution, whenever such jurisdiction is conferred upon it as a court. (*Ib.*, 411.) This matter evidently comes within that branch of the jurisdiction of the courts which was conferred by statute.

3. By the express language of the Constitution, the Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity as they previously possessed. (*Const.*, art. 6, § 5.) Having previously possessed the power to control the admission of attorneys entirely, that power must still be presumed to exist, unless withdrawn by express words or by necessary implication. In the absence of such words, the power of the Legislature is as unrestricted as that of the English Parliament. (*Phoenix v. The Emigrant Commissioners*, 12 *How. Pr.*, 14; *Cowen, J.*, 21 *Wend.*, 563.)

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vested in the judges." Whatever emanates from a judge as such, or proceeds from a court of justice, is, according to these authorities, judicial. This precise principle was involved in some of the cases which have been from time to time presented to

4. This power has not been withdrawn from the Legislature by express words. If removed at all it must be by implication.

The language of the Constitution affecting this point is: "Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practise in all the courts of this State."

This section cannot be regarded as an implied restriction upon the legislative branch of the government, for the following reasons:

a. The provision was inserted in the Constitution *diverso intuitu*. At the time of the adoption of the Constitution of 1846, there was a strong feeling adverse to any restrictions upon admission to the bar. This feeling existed in the convention which formed the Constitution. A resolution was adopted at an early period of the session, instructing one of the committees to inquire into the expediency of abolishing all restrictions upon the practise of the legal profession. (*Argus Debates*, 78.) At a later period it was proposed to restrict the courts so that they could not prohibit any person from practising except for want of good moral character. This not appearing likely to be adopted, the clause already alluded to was accepted by way of compromise. The plain object was not to confer power upon the courts, but privileges upon the citizen. The use of the word "entitled" shows the purpose with which the section was adopted. (*Ib.*, 575-577.) It will be remembered that the number of the profession had been limited in England by statute. By our own statutes (1 *Rev. Stat.*, 98, 1 ed.), as many attorneys, solicitors, and counsellors might be admitted as the courts licensed to practise. But the Legislature might reverse their own policy, and the courts be allowed to limit the number. The Constitution fixed a rule that every male citizen, &c., should be entitled to practise. This is a proper case for the application of the well-known principle concerning the construction of statutes, recognized by Blackstone in his Commentaries, to regard the old law, the mischief, and the remedy. Another reason for the provision was that as the courts are prohibited from making appointments to office, as will appear hereafter, some such clause was necessary, if admissions were thereafter to take place.

b. The clear object of the constitutional convention was to take away from the judiciary the power of appointment to office, as shown by the prohibition of the Constitution, that the judiciary shall appoint to any public office. Section 8, of article 6, is as follows: "They (*i. e.*, the judges of the Court of Appeals and of the Supreme Court) shall not hold any other office or public trust. All votes for either of them, for any elective office, except that of justice of the Supreme Court, or judge of the Court of Appeals, given by the Legislature or the people, shall be void. They shall not exercise any power of appointment to public office. Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practise in all the courts of this State." Now it will be shown that an attorney is a public officer, and that therefore the court can no longer appoint him.

That an attorney is a public officer, is shown by the language of 4 Henry IV.

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our courts under the acts for opening streets in the cities of New York and Brooklyn. The judges at first considered themselves, in the exercise of their powers under those laws, as acting not strictly as judges, but in a sort of administrative capacity as

(c. 18), as well as by the language of the Constitution of 1777, and by judicial decisions. Says Lord Hardwicke, in *Walmesley v. Booth* (*Barnardiston's Ch. R.*, 478, 479), "attorneys and solicitors are to be considered as public officers and ministers of justice. For this reason they have fees allowed them, and are under the government of rules in regard to the method of their proceedings." This case is recognized in the Matter of Daniel Wood. (*Hopkins' R.*, 6; and in *Merritt v. Lambert*, 10 *Paige*, 356, unanimously affirmed by the Court of Errors, in 2 *Den.*, 607.)

By 1 Revised Statutes (95, 98), attorneys are treated as public officers.

It is a well-known rule of interpretation, that a Constitution is to be construed in reference to the use of language by laws existing at the time of its adoption, and by the practice under them. (*Maryland v. Wayman*, 2 *Gill & Johns.*, 254; *Attorney-General v. Brunst*, 3 *Wis.*, 787; *People v. Coleman*, 4 *California*, 46.) The same rule is applied to statutes. Thus the words "beyond seas," had a meaning at common law before the statute of limitations, and such a meaning was given to the statute regarding the East India Company, passed in 1811. (*Ruckmaboye v. Mottichund*, 32 *English Law & Equity*, 84.) This case, which was decided by the judicial committee of the privy council, contains a full discussion of the point. *Dwarris on Statutes* (565), says that the word "Cottages" has the same sense in the statute 31 Eliz., as in Domesday Book. The result is, that the court cannot appoint attorneys. They are either under the constitutional provision appointed by its own energy, or if appointed at all, they come within the general clause in article 10, section 2, of the Constitution. "All officers whose election or appointment is not provided for by the Constitution, and all offices which may hereafter be created by law, shall be elected by the people or appointed as the Legislature may direct." The selection of the mode in which an appointment shall be made, is a proper exercise of legislative power. (*State v. Kennon*, 7 *Ohio, N. S.*, 546.)

At all events, the only function which the courts can be supposed to exercise upon this subject since the Constitution, is simply to ascertain the qualifications of applicants to be admitted to practise, and to enter an order not appointing attorneys, but simply stating that they are found to possess the requisite qualifications. This appears also from section 75, of the judiciary act.

c. It may, however, be said, as there is a form of admission to the bar clearly implied by the Constitution, and as some one is to judge of the age, character, and requisite qualifications of learning and ability, that the Supreme Court is the necessary body to ascertain these qualifications by an actual examination of the candidates. This argument, if valid at all, must go to the length of saying, that each court is necessarily the only tribunal which can personally judge of the qualifications of attorneys. But it is clear that admission is an act of the court, more or less formal, and depending upon such proof as the Legislature may provide. Were it otherwise, the argument would prove too much, for it overthrows entirely the present practice by which the Supreme Court admits to all the courts. How does the Supreme Court exercise this power? Certainly not by the Constitution, but by the judiciary act of 1847. Could not the power have been conferred upon

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commissioners; but subsequently changed their views in this respect, and took the ground, which has since been repeatedly confirmed, that the power was conferred not upon the judges as individuals, but upon the court; that their action in the matter

the Court of Appeals to have admitted to the Supreme Court? There cannot be a doubt of it. The Supreme Court of the first district, in holding the law of April 7, 1860, to be unconstitutional, do necessarily pronounce against the validity of all the admissions which they have themselves made, from the year 1847 down to the present time, allowing by their own fiat attorneys to practise in all the courts of this State.

d. Again, to say that the courts shall necessarily test the qualifications by their own examination, is simply begging the question. How does it appear to be so? The Constitution does not say so: admit that these qualifications are to be proved to the court—to each court. The question still recurs, how are they to be shown? To the Court of Appeals they are proved by the order of the Supreme Court, admitting to practise. To the Supreme Court they are facts to be proved by evidence. But it is altogether competent to the Legislature to determine what effect a certain instrument shall have as evidence. This point, which does not seem in need of argument, is adjudicated by the Court of Appeals in *Hand v. Ballou* (2 *Kern.*, 541). As it is expressed by the court, the Legislature have the power to determine by law what in civil cases shall be received by the court as presumptive evidence. The principle is the same whether the evidence be presumptive or conclusive. Thus the Revised Statutes have enacted, in a number of cases, what shall be regarded as presumptive, and what as conclusive evidence of a fact. Thus certified copies of decisions of the county superintendents of the poor are conclusive evidence of the facts therein contained. (1 *Rev. Stat.*, 624, 1 ed., §§ 61, 88.) In fact, the power of the Legislature to prescribe evidence for the courts has never been questioned. (*DeCamp v. Eveland*, 19 *Barb.*, 89.) So also where authority is conferred upon a body of men to decide a fact, and the decision is made accordingly, and the fact ascertained, no court has power to review the decision. (See *Lyon v. Jerome*, 26 *Wend.*, 485, 491, 495, 498.) See also the case of *Phoenix v. The Emigrant Commissioners* (12 *How. Pr.*, 3-15), for the same point. The consequence is that the Legislature had the constitutional right to enact, that the diploma granted under the provisions of the act in question should be evidence that the graduate possessed the qualifications requisite to an admission.

e. No such force can be given to the word "requisite" in the Constitution as to withdraw the subject from the sphere of legislation. The proper meaning of the word requisite is, that which is required. The question then recurs, required by what? The answer is, required by statute,—as all the requisites existing at the time of the adoption of the Constitution were statutory. If the word "requisite" be supposed to have had a fixed meaning given to it by the Constitution, and that sense to be the precise requirements of the year 1846, the consequence would follow that those qualifications could not be increased by the Legislature or by the court. The perpetual test of fitness to practise the profession would be the learning and ability required when the Constitution was adopted. It is evident, however, that the qualifications must be variable, and that a flexible and not an unyielding rule must exist. If then, the requisitions change, the only body who

was to be regarded as judicial, and that all the ordinary incidents of judicial proceedings were applicable to such cases.

In the case of *Patchin v. The Trustees of Brooklyn* (2 *Wend.*, 377), which was carried from the Court of Common Pleas to

can change them is that one which had the power to establish them when the Constitution was framed—that is, the Legislature.

f. The word "admission" in the Constitution has no such force as to confer exclusive power upon the Supreme Court. This word has different meanings, but does not necessarily, *ex vi termini*, imply any such sense as is given to it in the opinion of the Supreme Court, that is, to ask leave to enter, nor does it imply any right on the part of the admitter to refuse entrance. Its proper etymological meaning is motion into a place. Roget, in his *Thesaurus*, couples it with entrance, ingress, entry, introgression, &c., 290,295. It often means simply entrance; for example, we speak of the admission of heat through strata. Webster gives as one of its meanings the "power or right of entrance," hence actual entrance. Shakespeare often uses the word in that sense. Thus in *Cymbeline*, act 2, scene 3, Cloten says: "'Tis gold which buys admittance; oft it doth."

The ancient writs before alluded to show in what sense the word is used in connection with attorneys. The king commanded the justices to admit, and Governor Montgomerie required the justices to admit such and such a person as an attorney. Maugham, in his *Law of Attorneys* (6), says that the king might order the court to admit an attorney, which it was bound to do. To the lower courts, if commanded to admit, and they did not, an attachment would issue. (*Fitzherbert, N. B.*, 369, C. D.)

The meaning of the word may be tested by an example. The owner of a picture-gallery gives to a friend a ticket, upon which are printed the words, "Admit the bearer." He presents this to the official in charge of the gallery, and demands admission. Can we judge of his surprise when the attendant replies, "Do you not observe upon the ticket the word 'admit'?" I am in the habit of obeying the commands of my master, but in this case I am evidently released. This word 'admit' clothes me with a discretion. I have a right to refuse you entrance, which I now do. If you ask me why, I can only say, '*Sic volo, sic jubeo, stat pro ratione voluntas.*'"

The best test of the meaning of the word in the Constitution is to search the clause itself. The word "entitled" immediately precedes it. This means either a right to demand a thing, or that one is qualified to make a demand. (*Webster.*) It cannot have the latter sense in this section, because the Constitution supposes that the citizen has the qualifications before he is entitled. It evidently means a "right to demand." We may then insert in the clause the definition of the word "admit" given by the Supreme Court. The clause would then read: Any male citizen, &c., shall have a right to demand that he may have leave granted to him to practise, and he shall also have a right to demand that such permission be refused.

Such a construction gives no force to the words "having the requisite qualifications." The whole sentence would read: Any male citizen of the age of twenty-one years, of good moral character, and possessing the requisite qualifications of learning and ability, shall be entitled to ask leave to practise in all the courts of this State, and shall also be entitled to have that leave refused. This

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the Supreme Court by certiorari, Chief-justice Savage said: "This is a specially delegated power to the Court of Common Pleas as a court, and not to the judges as an *ex-officio* duty; and when such a power is committed to a court, all the ordinary

shows that the qualifications precede the admission, and that the word has no such sense as it is assumed to have. The words "entitled to an admission" confer a legal right which the court has no power to refuse. The most that can be claimed is that evidence ought to be submitted to the court to show how the person is entitled, which has been already noticed. If the word "admit" means "to ask leave," then it implies that leave must be asked of each and all the courts. This construction would overthrow the present practice of the Supreme Court.

g. The Legislature enacted in one case, that parties had sufficient qualifications under the Constitution. In the judiciary act, it was declared that every previously admitted attorney should become, and be thenceforth a counsellor. The qualifications of an attorney were determined by the Legislature itself, to be sufficient to admit him as counsellor without examination. This contemporaneous construction of the Constitution is entitled to great weight. (Stuart and Laird, 1 *Cran.*, 299; *Moers v. The City of Reading*, 21 *Penn.*, 188; *People v. Green*, 2 *Wend.*, 266, per MARCY, J.; *Sedgwick on Constitutional Law*, 487-8.) The Legislature distinguish in section 75, chapter 280, of 1847, between being entitled to practise and an admission to practise. So the act of 21 and 22 Victoria (ch. 85 in § 16), enacts that an attorney shall be entitled to be a proctor in the Court of Probate, and in section 63 provides a fee for an admission. The similarity between the provisions of this act taken together, and the language of our own law, and of our Constitution, is noticeable. The Legislature have passed various enactments requiring the courts to admit on the examination of counsellors. (*Laws of 1851*, ch. 48; 1853, ch. 91; 1855, ch. 310.) An act somewhat like the one in question will be found in Session Laws of 1859, ch. 267; also 1860, ch. 187, regarding the University of New York.

h. If it be said, why admit to practise? the answer is, such is the language of the Constitution and the law. In both cases the party is declared to have a title to be admitted. It may not be absolutely necessary, but still it is valuable to the practitioner. It furnishes him with a convenient means of proving his title to practise. His name is upon the roll, which was one of the great objects of the statute of Henry IV. It is more convenient to the court in administering discipline. It is not, however, for the court to object that such a proceeding is unnecessary. It is sufficient that the Constitution declares his right to it, and distinguishes between the title to an admission and the act of admission itself.

i. It may be urged that this section was not at all directed to the legislative power, but simply to the judiciary. It is found in the chapter on the judiciary, and in immediate juxtaposition to the subject of appointment by the judges. Its object seems to have been to prevent the judiciary from unreasonably restricting the right to practise. Therefore the Legislature not being intended, their power over the whole subject remains as plenary as it did before the Constitution, except that they cannot restrict the right more narrowly than the Constitution has done.

If it should be thought to have been intended to act upon the Legislature, it can only be restrictive under the maxim "That the enumeration of certain per-

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powers of such court, so far as they are applicable to the discharge of the particular duty, may be exercised as in ordinary cases." The same judge, in a subsequent case, viz., in the Matter of Canal-street (11 *Wend.*, 154), said: "If they misbe-

sons, is the exclusion of all others;" "*Expressio unius exclusio alterius.*" Great caution is necessary, however, in the application of this maxim. (*Broom's Legal Maxims*, 415.) Lord Coke furnishes to us an illustration of this principle. He says: "Although by Magna Charta, common pleas are no longer to follow the king, it does not result that other pleas must follow the king." (2 *Coke Inst.*, 25.)

The correct rule seems to be, that whenever the object of the provision is to confer privileges upon the citizen, the maxim is not to be applied. It has never been supposed that the ninth amendment to the United States Constitution, which provides that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people, was actually necessary, but only inserted for greater caution. The maxim cannot be so perverted.

5. This law is not unconstitutional, because it omits to mention that the applicant must be a male citizen of the age of twenty-one years, and of good moral character.

a. The Constitution is to be interpreted in connection with the law. It is tacitly assumed that the Legislature intended not to infringe upon the Constitution, unless the act directly necessitates an opposite construction. It surely cannot be necessary to repeat the Constitution in every law. Legislation would greatly increase in verbosity by the enforcement of any such rule. Such has always been the benign interpretation of statutes by the courts of common law. Where statutes are made, there are some things which are exempted and fore-primed out of the provisions thereof by the law of reason, though not expressly mentioned. (*Plow.*, 13 B; 2 *Inst.*, 118; *Dwarris on Statutes*, 623.)

Where an act gives a thing generally, it is subject to the general control and order of the common law. Words are to be taken in a lawful and rightful sense, if possible. (*Dwarris*, 594; *Co. Litt.*, 381; *B. Smith's Commentaries*, 697.)

In order that a law be unconstitutional, it must be plainly and manifestly in collision with some constitutional provision. (*Scott v. Smart*, 1 *Manning, Mich.*, 295.) Every reasonable intendment is to be made in favor of the proceedings of the Legislature. It is not to be presumed that the Legislature has violated the Constitution. (*Miller and Gibson v. The State*, 3 *Ohio, N. S.*, 482.)

b. By section 2 of the law of April 7, 1860, all acts and parts of acts then in existence, not inconsistent with this act, still remain in force. Statutes in *pari materia* are to be construed together. (*Smith on Constitutional Law*, 750-770.) Consequently it may be properly held that the judiciary act of May 12, 1847, chapter 280, is still in force, so far as it is not inconsistent with this law in reference to admissions under it. According to *Dwarris on Statutes* (569), acts in *pari materia* are to be regarded as one scheme. That class of provisions which provides for proofs of moral character, age, and citizenship, may perhaps be enforced as to admissions under the law in question. This view would involve the idea that the object of the law of April 7, 1860, was simply to furnish the court with evidence of learning and ability.

c. But the law of April 7, requires not merely an examination of three counselors, but also their recommendation. The word "recommendation" involves the

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have we punish them by attachment, as we might referees in a case committed to them. If, for any cause persons appointed, as commissioners are shown to be improper, we may, by virtue of the power of appointment, remove them and appoint others.

idea that the committee, who must consist of counsellors at law, are satisfied of their fitness in all respects, both under the Constitution and the laws. It will be remembered that these counsellors, like the judges and the Legislature, have sworn both to support the Constitution and the laws, and that it cannot be assumed that they will, in violation of their oaths, recommend any one for an office who is known to be disqualified by the express language of the Constitution. This plain principle is supported by numerous decisions. Thus in *Miller and Gibson v. The State* (3 *Ohio, N. S.*, 484), the court says: "The Legislature take an oath to support the Constitution, and we are not at liberty to presume that they have disregarded their oaths." So in *Marion Railroad Co. v. Davis* (13 *Georgia*, 68), it is said, all presumptions are in favor of a Legislature who have sworn to obey the Constitution. The same principle which is here invoked in favor of a legislative body, would apply to a body of commissioners who were intrusted with power of the kind in question. Will it be contended that it was necessary in the judiciary act to have enacted that the court shall admit none but such as have the requisite qualifications? Could not the court act on the Constitution and the law combined?

d. Even if this court should hold that the words of the law are too broad, it would not necessarily be void. It is a familiar principle of constitutional law to hold an act partly valid and partly void, provided that the valid and void parts can be separated. (See *Commonwealth v. Clapp*, 5 *Gray*, 97, 482, 486; *Mobile and Ohio Railroad Co. v. State*, 29 *Ala.*, 573; *State v. Copeland*, 3 *Rhode Island*, 33; *State v. Com. Perry Co.*, 5 *Ohio, N. S.*, 497.) The case in 5 *Gray* (482-6), holds that a portion of a section of an act may be valid and the other part void, provided that the Legislature must not be supposed to have designed the whole as one scheme, and to have refused to pass the one portion without the other. Under these decisions, it may well be doubted whether, even if the Legislature had expressly enacted that minors, or females, or aliens might be admitted, as well as those having the constitutional qualifications, the law would be totally void. It would undoubtedly be void *pro tanto*. For the sake of illustration, it may be supposed that the law consisted of two entirely separate sections; one of these admits those having the constitutional qualifications; the second, those who do not. Could not one of these sections be declared void and the other valid? Would it then make any difference if they were in the same section? Certainly not. The Constitution separates the two classes by the hypothesis, and they are not confounded, because they stand in each other's vicinity. Even at common law, goods are not said to be confused, because they stand in juxtaposition. A part of a section of a law being regarded as valid, and another part void, the court will treat the unconstitutional part as if it were stricken out of the statute. (29 *Ala.*, 573; 3 *Rhode Island*, 33.)

e. The Legislature have provided that the candidates shall be admitted. If this means that the court shall make an order for admission, then it has a superintending power to see that these persons possess the requisite qualifications.

f. The argument proves too much. For if the committee of counsellors had

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We are not the mere conduits of conveying authority to the commissioners. They become officers of our court, the proceeding is a proceeding in our court," &c.

It will be seen that the chief-justice in these extracts spoke

been expressly prohibited by statute from admitting unqualified persons, they might still, as a matter of fact, have recommended persons who did not possess the requisite statutory qualifications. If it be said that they break their oaths if they do so, that could also have been said in the former case. It is a very trite principle of constitutional law, that the possible abuse of a power or authority is no argument against its existence.

6. The law is not unconstitutional because it declares that no diploma of the college shall be sufficient evidence of the right of any graduate to be admitted to practise, which is given for any period of attendance upon the Law School for less than eighteen months.

a. The Constitution does not say so. At most this merely provides that the requisite qualifications of learning and ability shall be found to exist. What evidence shall be furnished of that fact does not anywhere appear. That the Legislature could not enact that this should be the only evidence of qualification, may be admitted. But that they could not enact that a term of clerkship should be a means of furnishing evidence of qualifications is not at all clear.

b. No student in the Law School is confined to an application under this law. He may, like his fellow-citizens, resort to the former practice. The Legislature provides two modes of admission to the bar; these are not exclusive, the one of the other, but collateral. They say to young men, if you take the one mode, you may be admitted in the one way; if you take the other mode, in the other. If you go to the Law School and ask for admission under the act of 1860, you must study so long; if not, you need not study at all, but may take the chances of an examination. You may leave the Law School at any hour and apply to the court for admission. Here are two parallel roads to the same point. The one is open to all. You have only to knock at the gate and be admitted. If you choose to take the other road, it will take you a much longer time to reach the entrance. If you do not like to pursue that course, leave it any moment. We will never make the other entrance more difficult of access for that reason. Who can say that, under such circumstances, there is any restriction upon the rights of the citizen?

c. Again. The clause in question simply declares what effect the contents of a certain piece of paper or parchment shall have as evidence. The act does not say that the student may not be admitted to the bar unless he has studied in the Law School eighteen months, but it simply declares that the diploma shall not otherwise be evidence of his right to practise. Can it be unconstitutional to declare what effect a document shall or shall not have as evidence? (See *Hand v. Ballou*, 2 *Kern.*, 541.)

d. No man can raise this objection but the student. If he chooses to waive his constitutional privilege, who can object? It is an ancient maxim that any one can renounce what was intended for his benefit.

7. The law should not be declared unconstitutional, unless the question is free from doubt. (*Lunt's Case*, 6 *Maine*, 412; *Franklin Bridge v. Wood*, 14 *Georgia*, 80; *Scott v. Smart*, 1 *Manning*, 295; *Fletcher v. Peck*, 6 *Cranch*, 87; *Morris v.*

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not of the action of the court in reviewing and confirming the reports of the commissioners which might be considered as more especially of a judicial nature, but of the appointment of the commissioners themselves; and the substance of what is said is, that as the power was conferred upon and exercised by

People, 3 *Den.*, 881; Decamp *a. Eveland*, 19 *Barb.*, 81; Foster *a. Essex Bank*, 16 *Mass.*, 245; also Farmers' Bank *a. Smith*, 3 *Serg. & R.*, 63, 73; *Sedgwick's Constitutional Law*, 482-4.) There must be no rational doubt (*Exp. McCollum*, 1 *Cow.*, 550). This rule is especially applicable when there has been a contemporaneous and continuous construction of the provision by the Legislature for many years, which has been uniformly acquiesced in.

The case of *McKeon a. Devries* (3 *Barb.*, 196), is not opposed to this argument. There was no admission provided for in that case, nor did the Legislature provide any mode of ascertaining qualifications. It was an attempt to make an agent rather than an attorney.

8. The argument *ab inconvenienti* is of no force on this question, unless there is a doubtful construction. (*People a. Green*, 2 *Wend.*, 277.) The only point that can be discussed is whether the law be unconstitutional, which is a question of law. Still even that argument may be successfully met. It is well known that under the present system of admission to practise, no uniform rule is evolved. The examination is mainly conducted by a fluctuating board of examiners; anon, rigid and severe, at other times easy and placable, while eight such boards are in session twice every year. No other public officers are treated in such a manner as this. It may be assumed that law schools proceeding upon a scheme or plan, may be so conducted that an examination may be a test of qualifications at once comprehensive and minute.

The mode of acquiring the principles of the Roman law may be referred to. It is well known that even during the time of the republic, skilful lawyers were surrounded by students, who followed them to the forum, listened to their expositions of legal principles, and thus learned the principles of jurisprudence. After the foundation of the empire, law schools arose. Jurisprudence had assumed the form of a severe and systematic science. When the two great sects in jurisprudence arose, Labeo, the parent of the one, was a distinguished professor, who spent six months of the year with his scholars, and six months in preparing lectures. The great jurists begin to speak of their preceptors, and of the school to which they belonged. It may be said that the profound lawyers in the palmiest days of Roman jurisprudence were formed by the oral instruction which they received in law schools. (*Ortolan's History of Roman Jurisprudence*, ed. 1858, § 385.) Later, in the days of Justinian, attendance upon particular schools was made compulsory, as it is now upon the continent of Europe. (See *Savigny's Hist.*, ch. 6, 485, 440.)

It is safe to say that jurisprudence should be studied like other sciences—the principles should be known first, and the practice acquired afterwards. It would not be a great mistake if education in schools as under the Roman law was made compulsory. In such a case, public opinion and legislation might and would require the schools to maintain a high standard of excellence.

IV. The order entered in this matter, denying the application of the appellant to be admitted to practise, should be reversed.

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the court as such, and especially as the officers when appointed, were in some sense officers of the court, the cases were to be regarded as subject to those incidents which ordinarily attend judicial proceedings. That the court in appointing these commissioners act judicially was also asserted by Gardiner, president of the Senate, in the case of *Striker v. Kelly* (2 *Den.*, 323). He says: "It might be objected with equal plausibility that the appointment of referees was an executive and not a judicial act. The referees, it is true, are officers of the court; but these commissioners are *quasi* officers, and may be compelled to perform their duty by attachment."

The same judge in a subsequent case in this court, viz., in the *Matter of Canal and Walker streets* (2 *Kern.*, 406), used, in reference to the same class of proceedings, the following language: "If the law of 1813 enlarged the jurisdiction of the Supreme Court, which in effect was decided in *Striker v. Kelly*, no other change was produced. The powers incident to its general jurisdiction, so far as applicable, at once attached to the new subject. In administering this law, as every other, the court would require the services of its officers, punish for contempt, issue attachments, use the buildings appropriated to the ordinary business of the court, and set aside the proceedings on sufficient cause."

The principle to be deduced from these extracts obviously is, that where any power is conferred upon a court of justice, to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power. The Legislature, by conferring any particular power upon a court, virtually declares that it considers it a power which may be most appropriately exercised under the modes and forms of a judicial proceeding. If, therefore, there were nothing whatever to characterize the proceedings in this case, as in any respect judicial, except that they were had in the exercise of a power conferred upon the Supreme Court as a court, I should not hesitate to hold that they were subject to all the ordinary incidents of other proceedings in courts of justice.

But I regard the nature of the office as of no little importance in determining the question which arises here. In the

cases to which I have referred, the courts have laid stress upon the fact that the commissioners, when appointed, become officers of the court, and, as such, subject to its direction and control. This is an argument which applies with far greater force to the present case. Attorneys and counsellors are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may with propriety be intrusted to the courts, and the latter, in performing this duty, may very justly be considered as engaged in the exercise of their appropriate judicial functions.

By a statute of the State of Missouri, the Supreme Court of that State was authorized to strike from the rolls any attorney guilty of contempt, malpractice, &c. And the Circuit Court was empowered to suspend from practice any attorney guilty of any misconduct which, in the opinion of that court, should be such as to justify his being stricken from the rolls. Under this statute, George Strother, an attorney, was suspended by the Circuit Court of St. Louis county, for six months, by an order entered in the minutes of the court. Strother brought a writ of error to the Supreme Court, and that court sustained the writ, and reversed the order of the Circuit Court. (*Strother v. The State of Missouri*, 1 *Miss. R.*, 605.)

Again, the Supreme Court of the Territory of Minnesota, before its admission as a State, was authorized by a statute of the Territory to remove an attorney for wilful misconduct. Under this law, one David A. Secombe was removed by an order of the court, reciting the cause. Secombe thereupon presented a petition to the Supreme Court of the United States, praying for a mandamus to be directed to the Territorial Court, commanding such court to vacate the order. The mandamus was denied upon the sole ground that the act of removal was a judicial act. Chief Justice Taney said: "We are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or annul its decision, when the decision was in its nature a judicial act." (19 *How. U. S. R.*, 15.) If the removal or suspension of an attorney be, as was held, in these cases, a judicial act, it is difficult to see how the admission of an attorney is any the less so; especially when, as here, the court in the act of admission is required to pass not only upon the sufficiency of the evidence of certain facts, but upon the constitu-

tionality and validity of a statute, and thus to exercise the highest judicial function ever intrusted to a court.

But in addition to the arguments and authorities already presented, there is another consideration which serves, as I think, very conclusively to show that the action of the Supreme Court in this case is not executive but judicial. There are, no doubt, certain governmental powers and functions which, although exercised by a court of justice, would nevertheless be purely administrative in their character. Such, for instance, is the power conferred by the Revised Statutes upon Courts of Common Pleas, to grant licenses for keeping ferries; and such, no doubt, would be a power merely to select and appoint officers with duties having no connection with the courts, and who would not, by their appointment, become in any sense officers of the court appointing them. But there is a marked distinction between such cases and that under review. In the act of licensing ferries, the court does not pass upon a right, but simply exercises a discretion. The statute confers no right to a ferry upon any individual, whatever may be the circumstances. If it did, and the court was authorized to adjudicate as to the existence of the facts entitling the party to the right, its act in so doing would clearly be judicial. In regard to attorneys, the Constitution confers the absolute right of admission upon every one possessing the requisite qualifications. The court is called upon to determine as to the existence of this right. It being ascertained that the applicant possesses the requisite qualifications, his admission follows as a legal necessity. It is certainly clear, as a general rule, that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature, and I am unable to perceive any just ground upon which the present case can be considered as an exception.

But it does not necessarily follow that the order is appealable. That depends upon the provisions of the Code authorizing appeals to this court. By subdivision 3, of section 11, taken in connection with the previous portions of the section, it is declared that this court shall have jurisdiction to review every actual determination made at a general term of the Supreme Court, "in a final order affecting a substantial right made in a

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special proceeding." That the order under review is an actual determination of the court, that it is final, and that it affects a substantial right, will not be doubted. The only question which can arise upon this part of the case is, whether it was made in a "special proceeding."

By section 1 of the Code, remedies in courts of justice are divided into actions and special proceedings. Section 2 defines an action to be an ordinary proceeding, viz., in a court of justice; and section 3, declares that every other proceeding is a special proceeding. As the application in this case could not by possibility be an action, it is of course a special proceeding, provided it is a remedy at all under section 1. What then is a remedy? The only judicial exposition of the subject appears to be that contained in a remark of Johnson, J., in *Belknap v. Waters* (1 *Kern.*, 477). He says: "The Code, unfortunately, has not furnished us a definition of a remedy, except in so far as one can be drawn from its distribution of all remedies into actions and special proceedings. It seems to regard every original application to a court of justice for a judgment or an order as a remedy. According to this interpretation, which I deem just, the application of the appellant to the Supreme Court was clearly a remedy. If we take the definition of the word remedy given by lexicographers, the result is the same. Bouvier defines remedy to be "the means employed to enforce a right, or redress an injury." This definition would clearly embrace the present proceeding; since every applicant has, as we have seen, an absolute constitutional right to admission, provided he is a citizen and of the required age, character, and ability, and the object of the application was to enforce this right.

It becomes our duty, therefore, to review the order of the Supreme Court denying the right of the appellant to admission as an attorney; and in doing so it will be assumed, as the court appears to have assumed, that the only objection to his admission was that upon which his rejection by the court was based, viz.: The unconstitutional nature of the act of April 7, 1860, under which the application was made.

Several objections to the validity of this act are suggested by the Supreme Court. The first is, that it makes the possession by a graduate of the Law School of Columbia College of a

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diploma conferring the degree of Bachelor of Laws the only prerequisite of admission to practise, while the Constitution requires that the applicant, to be entitled to such admission, must be a male citizen of the age of twenty-one years.

If the act were necessary to be construed strictly according to its terms, this objection would perhaps prove to be well taken. Interpreted literally and by itself alone, it would seem in effect to declare that any graduate of the Law School, who has obtained a diploma under the circumstances mentioned in the act, shall be admitted to practise, irrespective of age, citizenship, and sex. But a construction which would bring an act of the Legislature into direct and palpable collision with the Constitution, is not to be adopted without imperious necessity. It is never to be presumed that the Legislature has violated the organic law. A strong presumption to the contrary is indeed to be overcome in every case, before a law can, with propriety, be declared unconstitutional. If, by the application of the established rules of statutory construction, it can be so interpreted as to harmonize with the Constitution, this interpretation is to be adopted. One of these rules is, that a statute is to be considered as passed in view of, and is to be construed in connection with, the existing laws on the same subject. Another is, that we are to look at the general scope and design of the law, at the evil to be remedied, or the benefit attained, and so to construe the law as to accomplish the object the Legislature has in view.

The motive for passing the act in question is apparent; Columbia College being an institution of established reputation, and having a Law Department under the charge of able professors, the students in which department were not only subjected to a formal examination by the Law Committee of the institution, but to a certain definite period of study before being entitled to a diploma as graduates, the Legislature evidently, and no doubt justly, considered this examination, together with the preliminary study required by the act, as fully equivalent, as a test of legal acquirement, to the ordinary examination by the court; and as rendering the latter examination, to which no definite period of preliminary study was essential, unnecessary and burdensome.

The act was obviously passed with reference solely to the

learning and ability of the applicant, and for the mere purpose of substituting the examination by the Law Committee of the College for that of the court. It could have had no other object, and hence no greater scope should be given to its provisions. We cannot suppose that the Legislature designed entirely to dispense with the plain and explicit requirements of the Constitution; and the act contains nothing whatever to indicate an intention that the authorities of the College should inquire as to the age, citizenship, &c., of the students, before granting a diploma. The only rational interpretation of which the act admits is, that it was intended to make the college diploma competent evidence as to the legal attainment of the applicant, and nothing else. To this extent alone it operates as a modification of pre-existing statutes, and it is to be read in connection with those statutes and with the Constitution itself, in order to determine the present condition of the law on the subject.

Again, it is suggested that the clause in the act, which makes a previous attendance upon the Law School for a certain definite period an indispensable condition of admission under the provisions of the act, brings it in conflict with the Constitution.

This objection has far less weight than that just considered. The Supreme Court was, no doubt, correct in assuming that the constitutional provision was intended to deprive the courts of all power to require any particular period of study, as a necessary preliminary to admission to the bar; and to confer upon all male citizens of the requisite age, however short may have been their period of study, the right to be admitted, if properly qualified. If the act in question should be found in the slightest degree to have abridged this right, it would be clearly invalid. By no reasonable construction, however, can it be made to have that effect. Students in the Law School are under no obligation to avail themselves of the provisions of the law. The wide door thrown open by the Constitution is in no respect narrowed. They may retire at will from the Law School and present themselves to the court for admission. No privilege, therefore, conferred by the Constitution is taken away or impaired. Those who wish to avail themselves of the additional privilege afforded by the act must comply with its provisions. Although the Legislature cannot limit a right given by the

Constitution, it may surely impose conditions upon privileges granted by itself. This is so plain as to admit of no debate.

But the most serious objection to the law, and that upon which the judgment of the court below was mainly based, is, that the power to appoint or admit attorneys and counsellors is vested exclusively in the courts, and that, in this respect, the act in question is in conflict with the Constitution and void. If such an exclusive power is vested in the courts, it must be derived directly from some specific provision or provisions of the Constitution. It cannot be claimed as a part of the inherent power of the courts, or as resulting necessarily from their organizations as courts. To show this, it is unnecessary to go at length into the history of attorneys and counsellors as a separate class. It will be sufficient briefly to refer to the manner in which, prior to the Constitution of 1846, they had received their appointments both here and in England. Barristers or counsellors at law, in England, were never appointed by the courts at Westminster, but were called to the bar by the Inns of Court, which were voluntary unincorporated associations. The power of the court to appoint attorneys as a class of public officers was conferred originally, and has been from time to time regulated and controlled in England by statute. (4 Hen. IV., ch. 18; 3 Jam. I., ch. 7; 6 & 7 Vict., ch. 73, § 27; 20 & 21, Vict., ch. 77, §§ 40-45.)

In this State, it seems that attorneys, prior to the Revolution, were appointed by the governor of the colony. (People *v.* The Justices of Delaware, 1 *Johns. Cas.*, 182.) By the Constitution of 1777, the power of appointing this class of officers was vested directly in the courts; but the Constitution of 1822 was silent upon the subject, thus leaving the matter in the direction and control of the Legislature, which, at its next session, passed an act requiring attorneys to be licensed by the courts in which they should respectively practise. It is plain, therefore, that although the appointment of attorneys has usually been intrusted in this State to the courts, it has been, nevertheless, both here and in England, uniformly treated not as a necessary or inherent part of their judicial power, but as wholly subject to legislative action. I take no notice of the distinction between attorneys and counsel in the courts of this State, because the same principles in respect to the mode of appointment are, of course, applicable to both.

It follows, from what has been said, that unless the Constitution of 1846 has either expressly or impliedly conferred upon the Supreme Court, or upon the several courts, the exclusive power claimed in this case, the whole subject of the admission of attorneys and counsellors was left as theretofore, in the hands of the Legislature, subject only to the constitutional provisions bearing upon it. Let us see, then, whether the exclusive power in question can be fairly derived from any provision of the Constitution. The learned judge, by whom the opinion was delivered in the court below, has attempted to deduce it indirectly from sections 3 and 5 of article 6, which, in effect, organize and establish the Supreme Court, with substantially the same jurisdiction it previously possessed. His argument is that, by the Constitution of 1777, the appointment of attorneys, &c., was given without limitation to the courts; that although the Constitution of 1822 was silent on the subject, the Legislature, in the absence of any constitutional provision, had, by express enactment, continued the power possessed by the courts under the previous Constitution; and that, as the Constitution of 1846 was adopted with full knowledge of the power possessed and exercised by the Supreme Court, the inference is, that it was intended to confirm this power with such modifications and restrictions only as were inserted in the Constitution. He refers to the familiar rule, that a statute which in some measure conflicts with a previous statute, but which it does not in terms repeal, simply abrogates so much of the former statute as is inconsistent with the new enactment, leaving the residue in force; and that the effect of a new constitutional provision upon pre-existing statutes is the same.

In this, the judge is no doubt correct; but his inference that the power thus exercised by the Supreme Court, is thus established so as to be beyond the control of the Legislature, is plainly erroneous. Upon this theory, such parts of our existing statutes as were not abrogated by the new Constitution, would be rendered thereafter unchangeable. The Constitution of 1846 left, it is true, so much of the previous statute on the subject of the admission of attorneys as did not conflict with its provisions in full force, but did not take away the power of the Legislature to alter it. Indeed, the specific provision of the Constitution on the subject of attorneys, in the connection in which it

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stands, bears much more the aspect of being designed to take power from the courts than to confer it upon them. The entire section reads as follows: "They (*i. e.* the judges) shall not hold any other office or public trust. All votes for either of them for any elective office except that of justice of the Supreme Court or judge of the Court of Appeals, given by the Legislature or the people, shall be void. *They shall not exercise any power of appointment to public office.* Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practise in all the courts of this State."

The object of this provision is plain. Attorneys, solicitors, &c., were public officers; the power of appointing them had previously rested with the judges, and this was the principal appointing power which they possessed. The convention was evidently dissatisfied with the manner in which this power had been exercised, and with the restriction which the judges had imposed upon admission to practise before them. The prohibitory clause in the section quoted, was aimed directly at this power, and the insertion of the provision respecting the admission of attorneys, in this particular section of the Constitution, evidently arose from its connection with the object of this prohibitory clause. There is nothing indicative of confidence in the courts, or a disposition to preserve any portion of their power over this subject, unless the Supreme Court is right in the inference it draws from the use of the word "admission" in the section referred to. It is urged that the admission spoken of must be by the court; that to admit means to grant leave, and that the power of granting necessarily implies the power of refusing, and, of course, the right of determining whether the applicant possesses the requisite qualifications to entitle him to admission.

These positions may all be conceded without affecting the validity of the act. The Legislature has not taken from the court its jurisdiction over the question of admission, but has simply prescribed what shall be competent evidence in certain cases upon that question. It is not necessary, as seems to have been supposed by the court below, that the power to do this should be especially granted by the Constitution. The general grant of power in section 1, article 3, embraces the entire legis-

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lative power of the State, which in itself is absolute and unlimited. Whether, therefore, the Constitution contains a restriction upon this power in the particular case, is the only question which can ever arise in respect to any exercise of power by the Legislature. There are, no doubt, some restrictions upon the power of the Legislature to prescribe rules of evidence, as otherwise it might subvert some of the most valuable guaranties contained in the Constitution. These restrictions have never been judicially defined, but they clearly do not reach the present case.

It will not be doubted, even assuming that the court had the exclusive power of "admission," that the Legislature might have provided that the affidavit of the appellant should be evidence upon the question of age, or the certificate of some public officer upon that of citizenship. There is no substantial difference, in respect to the power of the Legislature, between such cases and that under consideration. The diploma simply proves that the applicant has the requisite learning and ability, but leaves the facts in regard to the length of study, the age, citizenship, &c., of the applicant, to be inquired into and passed upon by the court in determining the question of admission.

But I see no good reason for holding that it was intended to refer even the ultimate act of admission exclusively to the court. If the Constitution is to be so interpreted, then it is clear that the Legislature, the legal profession, and even the courts themselves, have been greatly in error. The very next Legislature after the Constitution was adopted, in passing the judiciary act, assumed that the admission of attorneys and counsellors to practise, subject to the restrictions contained in the Constitution, was left as before, in the hands of the Legislature, and its action in this respect has been uniformly acquiesced in by both bench and bar. The Supreme Court itself has repeatedly ratified and confirmed this legislation, as it is by virtue of the judiciary act alone that it has exercised the power of admitting attorneys and counsellors to practise in other courts. There can be no pretence that the Constitution invests the Supreme Court alone with this power. If the construction adopted by the court below is sound, the consequence must, of course, be, that each court would have a right to admit its own practitioners. It

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would be difficult to find any theory in the Constitution which, even by implication, could authorize it to admit attorneys, &c., to practise in the County Courts or in the Court of Appeals.

I do not doubt, however, that the Supreme Court may, with propriety, be invested with this power, notwithstanding the clause which prohibits the judges from exercising any power of appointment to office. The admission of an attorney under the provisions of the present Constitution, is not an appointment. Whenever an applicant is found to possess the requisite qualifications, the Constitution, by its own inherent energy, appoints, *i. e.*, it gives to the applicant an absolute title to the office, which is equivalent to an appointment. The word admission means, no doubt, as it has uniformly been interpreted to mean, something more than merely permitting the appearance of persons who may present themselves in particular cases claiming the right to practise. It is to be understood with reference to the long-established custom of admitting and licensing attorneys, not for a single occasion, but generally; upon any other construction, every practitioner would be obliged to hold himself in readiness, at all times, to prove that he was possessed of the requisite constitutional qualifications, which would be extremely inconvenient and embarrassing to the administration of justice. No doubt some kind of formal admission was contemplated; but so far as I can see, that admission, under the provisions of the Constitution, may as well have been by the governor, the attorney-general, or any other public functionary, as by the courts. There was a propriety, certainly, in investing the courts with the power, as the Legislature has done; but this was a question of mere legislative discretion. My conclusion, therefore, is, that the act under consideration is valid, and hence that the order appealed from should be reversed.

In regard to the constitutional question, all the judges concurred, except COMSTOCK, Ch. J., who also, together with DENIO and WRIGHT, JJ., dissented from that portion of the opinion holding the order in question appealable.

Order reversed.

A similar decision was made in the case of the appeal from the order denying admission to the graduates of the New York University.

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The appellants thereupon applied to the court below for admission, who accordingly admitted them, but with the following explanation :

By THE COURT.—SUTHERLAND, J.—It seems that a reversal of the orders made by this court in May last, denying the applications of these young gentlemen (the former a law student of Columbia College, and the latter of the University of New York) for admission to practise as attorneys and counsellors of this court, under special and recent acts of the Legislature of this State, has been procured from the Court of Appeals.

It seems that the clerk of this court, without any order of this court, made a return to the Court of Appeals, of the orders and proceedings in the matter of these applications, and that the Court of Appeals, on an *ex-parte* application and argument, without notice to the attorney-general, or any other person, have held the acts of the Legislature to be constitutional, reversed the orders of this court, and directed the court to admit these young gentlemen.

When the justices of this court who were sitting in the Court of Appeals in this matter, shall have performed the high duties which the Constitution temporarily consigned to them in that court, and shall have returned to their own court, we shall, no doubt, be informed by them of the peculiar circumstances (if any) which may have induced this (as it appears to us) extraordinary proceeding on the part of the Court of Appeals; but in the mean time, to prevent even the appearance of a want of respect for law and order, this court yields, as to these applicants, to the decision of the Court of Appeals, at the same time respectfully, but earnestly protesting against it, for reasons, and on grounds which will be stated more at large hereafter, and on the understanding that these admissions are not to be considered as at all conclusive as to future applications of a similar character.

On a similar application, subsequently made on behalf of other graduates in the second district (present, LOTT, EMOTT, and BROWN, JJ.), this protest was reviewed upon the argument; and after advisement, the court unqualifiedly granted the application.

CLAFLIN *a.* SANGER.

Supreme Court, First District; General Term, February, 1860.

CONFESSION OF JUDGMENT.—STATEMENT OF INDEBTEDNESS ON
NOTE.

A statement for judgment by confession, that the indebtedness arose on a promissory note of specified date and amount, which note was given to parties named, for goods theretofore bought by defendant, which note was indorsed by the debtor, and came into the hands of the plaintiff for a valuable consideration—is insufficient.

There is no distinction in respect to the particularity of statement required, between the case of a confession of judgment to the original creditor, and that of a confession to a subsequent owner of the demand.

Appeal from an order setting aside a judgment.

Andrew S. Stone and others recovered in this court on the 30th day of January, 1858, a judgment against Rufus Sanger (the defendant above named) for \$3,389.19, on which an execution was issued, and returned unsatisfied. Subsequently, and on May 25, 1859, judgment in the above-entitled action for \$1,572.06, was entered upon a confession in the following form:

“A promissory note (for a specified date and amount), which note was given to Loeschigh, Wesendonck & Co., for goods, wares, and merchandise theretofore purchased of Loeschigh, Wesendonck & Co. by the defendant; which note was indorsed by the debtor, and came into the hands of the plaintiffs for a valuable consideration.”

An execution was issued in this action on May 25, 1859, and a levy made thereupon; and an execution in the case of Stone *a.* Sanger was issued on May 26, 1859.

A motion was made on behalf of Stone, &c., at special term, on August 19, 1859, before INGRAHAM, J., to set aside the execution in this action, and the levy thereunder, as against the execution in the case of Stone *a.* Sanger, on the ground that the statement in the confession was insufficient, which motion

was granted (9 *Ante*, 214), and from the order entered on that motion this appeal was taken.

J. T. Williams, for the appellant.—I. The Code requires (§ 383, subd. 2) that the affidavit “state concisely the facts out of which the debt arose, and show that the sum confessed therefor is justly due.”

This same statute requires that a complaint contain “a plain and concise statement of facts constituting a cause of action.”

It is therefore plain, from the letter of the statute, that what would be sufficient in a complaint, would also be sufficient in a confession.

It is still plainer, that from the spirit of the statute, the reason of it, the nature of the evil to be guarded against, the danger of, or exposure to such evil, that at least no more is required in a confession than in a complaint,

For the following reasons :

1. The affidavit to a complaint may be sworn to on information and belief, by a party who knows only from hearing.

The affidavit to the confession must be sworn to positively, and of a party's own knowledge.

2. The affidavit to a complaint is sworn to by a party who is swearing money into his pocket.

The affidavit to a confession is sworn to by a party who is swearing money out of his pocket.

3. If parties desire to commit fraud, and procure a fraudulent judgment, it is done much easier by a complaint than by a confession,

In the following respects :

The complaint may be sworn to by a party or his agent, on information and belief ; the defendant has only to direct an attorney to offer judgment under section 385, and a judgment, unquestionably valid, is entered on the spot. This is a speedier and more convenient method, and since the decision in this case at special term is, I understand, most generally adopted by the profession.

II. Compare the sworn statement in the present case with the requirements of a complaint as settled in the case of *Allen v. Patterson* (3 *Seld.*, 476).

III. The decision of the special term in this case entirely

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nullifies the provisions of the Code for the confessions of judgments. It would not be possible to state any thing not here stated. It will be observed that nearly two years intervened between the purchase of the goods and the giving of the note. If the defendant had gone into the store of Loeschigh, Wesendonck & Co., on the 11th day of September, 1857, and bought a quantity of goods, and the amount of them had been footed up upon the slate, or loose piece of paper, and they had amounted to just the sum of \$1,565.94, and he had given his note at four months for the same, and had taken the goods and carried them away to his own store, and sold them, all this would have been in due course of business, and the court cannot presume this was not the case; and if, on the 25th day of May, 1859, he had been called on to confess a judgment upon the note so given, is there one single fact that could throw light upon the *bona fides* of the transaction that can reasonably be presumed to be within his memory, that is not narrated in this confession?

IV. As a matter of authority, the decision of the special term is contrary to law. Chappel *a.* Chappel (2 *Kern.*, 215) is the full extent to which the Court of Appeals have gone. Moody *a.* Townsend, a special-term decision (3 *Abbotts' Pr.*, 375), is the full length the Supreme Court has gone. The former case is in nowise in point; and it is insisted that the latter does not sustain the order appealed from in this case. While the decisions holding a different doctrine than that contended for in this action, are Johnson *a.* McAusland, a general-term decision of this district (9 *Abbotts' Pr.*, 214); Manchester *a.* Preston (14 *How. Pr.*, 21); Delaware *a.* Ensign (21 *Barb.*, 85); Park *a.* Church (5 *How. Pr.*, 381); Schoolcraft *a.* Thompson (9 *Ib.*, 61); Mann *a.* Savage (7 *Ib.*, 449); Whitney *a.* Kenyon (7 *Ib.*, 458); Post *a.* Coleman (9 *Ib.*, 64); Freligh *a.* Brink (18 *Ib.*, 89).

John H. McCunn, for the respondents.—I. The statement is clearly insufficient. The only attempt to show the facts out of which the indebtedness arose is, that the "note was given for goods, wares, and merchandise theretofore purchased of Loeschigh, Wesendonck & Co. by the defendants." There is no statement of what kind of goods were purchased, nor at what time or price, nor what quantity; nothing from which the cred-

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itor can form an opinion as to the integrity of the debtor in confessing the judgment.

For this purpose the courts have uniformly required the parties to spread upon the record a specific and particular statement of the facts out of which the indebtedness arose. (*Chappel a. Chappel*, 2 *Kern.*, 215; *Moody a. Townsend*, 3 *Abbotts' Pr.*, 375; *Davis a. Morris*, 21 *Barb.*, 152; *Winnebrenner a. Edgerton*, 17 *How. Pr.*, 363; S. C., 8 *Abbotts' Pr.*, 419; *Stebbins a. M. E. Church*, 12 *How. Pr.*, 410; *Lockwood a. Finn*, 13 *Ib.*, 418; see also 23 *Barb.*, 652; *Beekman a. Kirk*, 15 *How. Pr.*, 228; *Freligh a. Brink*, 16 *Ib.*, 272; *Dunham a. Waterman*, 6 *Abbotts' Pr.*, 337; S. C., 17 *N. Y.*, 9.)

II. The same degree of conciseness and particularity is required in a statement for a confession, whether the plaintiffs be third parties or the original parties to the indebtedness. The statute makes no distinction, and none has ever been recognized by the courts. The debtor, not the creditor, makes the statement, and there is no reason why he should not make it as full and particular in the one case as in the other. It is in his power so to do, and the court will always require him to do it, in order to prevent fraud; justice and public policy require that no other or different course should be permitted. (*Code*, § 383.)

THE COURT* affirmed the order, adopting as theirs the opinion of INGRAHAM, J., rendered at special term, which was as follows:

INGRAHAM, J.—This motion is made by a judgment-creditor of the defendant to set aside the judgment in this case for a defect in the statement of indebtedness. The judgment was entered on a confession. The statement of the indebtedness was as follows: "a promissory note (for a specified date and amount), which note was given to L. W. & Co., for goods, wares, and merchandise theretofore purchased of L. W. & Co. by the defendant, which note was indorsed by the debtor, and came into the hands of the plaintiffs for a valuable consideration."

* Present, LEONARD, BONNEY, and SUTHERLAND, JJ.

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The objection to this statement is, that it does not state the facts out of which the indebtedness arose. In all the cases it is conceded that the object of the statute was, to compel the debtor to disclose so much of the transaction out of which the indebtedness arose as to enable the creditor to form a more accurate opinion as to the integrity of the debtor in confessing the judgment; and for this purpose to compel the parties to spread on the record a particular and specific statement of the facts out of which the indebtedness arose. (*Chappel a. Chappel*, 2 *Kern.*, 215.)

The precise question, as presented in this case, appears to have been passed upon, by the general term in this district, in *Moody a. Townsend* (3 *Abbotts' Pr.*, 375). *ROOSEVELT*, J., in that case says: "A general allegation, that the judgment was for goods sold and delivered," is not a compliance with the requirements of the statute.

In *Freligh a. Brink* (16 *How. Pr.*, 272), *BROWN*, J., held that a statement which averred the indebtedness to arise on a note for \$700, that amount of money being had by the defendant of the plaintiff, and which was due, was insufficient. In *Stebbins a. Methodist Episcopal Church* (12 *Id.*, 410), *SMITH*, J., held that a statement of indebtedness for money lent and advanced by the plaintiff to the defendant, and which had been used to pay his debts, was insufficient, because it did not state when the money was lent, in what sums, and at what times.

In *Lockwood a. Finu et al.* (13 *How. Pr.*, 418), *ROSEKEANS*, J., held that a statement that the indebtedness for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant since a specified date, was insufficient, because it did not set forth what kind of goods, &c., were sold, nor how much, nor at what time. That it did not point to any particular transaction to which other creditors could direct their inquiries.

In *Beekman a. Kirk* (15 *How. Pr.*, 228), *HARRIS*, J., held that a statement of indebtedness, in a judgment recovered on a bond given for money borrowed by the defendant, was defective for want of disclosing the amount of the loan or when the judgment was recovered. (See, also, 17 *N. Y.*, 9.)

There are many other cases which might be cited, of a similar character, but the above are amply sufficient to show that

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the views entertained by the judges in these cases, when applied to the present case, would condemn the statement as insufficient and defective. I will only add one more made by the general term of this district. In *Davis a. Morris* (21 *Barb.*, 152), MITCHELL, P. J., held a statement of indebtedness, to be for money lent and advanced at divers times by the plaintiff to the defendant, from 1853 to date, was insufficient.

These decisions, two of which are by the general term of this district, are controlling upon this question, notwithstanding there are some few cases of a contrary tenor, by the judges at special term in other districts, such as *Post a. Coleman* (9 *How. Pr.*, 64).

The plaintiffs in this action were not the original creditors by whom the goods were sold, and it was suggested that less particularity was required from them than would be from the persons to whom the debt was originally due.

There is no distinction made in the statute, and there is no good reason shown for making any such distinction.

The statement is to be made by the debtor and not the creditor, and he can as well state the particulars in one case as the other. He knows the particular transaction out of which the indebtedness arose, and he can state it as easily after the claim has been transferred to a third person, as he could before the transfer.

The motion to set aside the judgment, as to the creditor making this motion, must be granted.

SUTHERLAND, J., dissenting.—In this case the order at special term should be reversed, with \$10 costs on the appeal and \$10 costs of opposing the motion below to the appellants.

In my opinion it is a clear case.

The statement on which the judgment in this action was entered by confession was, in my opinion, abundantly sufficient.

Order affirmed.

Rich a. Salinger.

RICH a. SALINGER.

New York Common Pleas; Special Term, December, 1860.

DISCHARGE.—MOTION TO SET ASIDE EXECUTION.

An objection to the validity of a discharge in insolvency, whether on the ground of want of jurisdiction or otherwise, cannot be raised on a collateral motion—*e. g.*, in opposition to the debtor's motion to set aside an execution on the ground of his discharge.

The proper mode of testing the discharge in such case, is to sue upon the judgment instead of issuing execution.

Motion to set aside execution.

DALY, F. J.—This is a motion to set aside an execution issued after the defendant had been discharged under the two-thirds act. The motion is opposed upon the ground that no notice was received by the plaintiffs, or by either of them, of the defendant's application to be discharged. The fact that no notice was received by the plaintiff would not, of itself, show that the officer acted without jurisdiction; but independent of that, an objection to the validity of the discharge, either upon the ground of want of jurisdiction or for any of the causes specified in § 40, Art. III., 3 Rev. Stat. (98, 5 ed.), could not be determined upon a motion like this. The discharge is declared by statute to be *conclusive* evidence of the proceedings and facts therein contained. In § 19, Art. VII., 3 Rev. Stat. (112, 5 ed.), and in § 37, Art. III., 3 Rev. Stat. (98, 5 ed.), provision is made for pleading the discharge in bar of any action brought to enforce a claim affected by it; in consequence of which provisions it has been held repeatedly that the question of the validity of a discharge cannot be inquired into upon a motion or trial by affidavits. (Reed a. Gordon, 1 Cow., 50; Reynolds a. Manning, *Id.*, 223; Noble a. Johnson, 9 Johns., 259; Cole a. Stafford, 1 Cai., 249; Taylor a. Williams, 20 Johns., 21.) If the plaintiffs wished to test the validity of the discharge, they should have brought an action upon their judgment, when, upon the defendant's plead-

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ing the discharge in bar, they could go behind it and show that the officer had not acquired jurisdiction, or impeach it for any of the causes which would, under the statute, make it void. In this proceeding it is conclusive and the motion must be granted.

ACKROYD *a.* ACKROYD.

Supreme Court, First District; Special Term, November, 1860.

ATTACHMENT.—AFFIDAVIT TO CAUSE OF ACTION.

Under section 229 of the Code,—which requires, as a foundation for a warrant of attachment, that it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the ground thereof,—if the action is for an accounting, and the complaint shows that the plaintiff is unable to state the amount due him, his affidavit that there is a certain sum due him, is not enough to authorize an attachment.

If the plaintiff shows that he does not and cannot know whether any thing is due him, his statement of his opinion as to the amount, is not enough.

Motion to discharge an attachment against the property of the defendant as a non-resident debtor.

John E. Develin, for the motion.

William Fullerton, opposed.

LEONARD, J.—This action was commenced in 1858, and was at issue on complaint and answer more than a year before the warrant of attachment was granted.

The motion is founded on the pleadings, as well as on the affidavit of the plaintiff, upon which the attachment was granted, and also the affidavit of the defendant.

The complaint alleges a partnership between the parties, a dissolution thereof, an assignment of the plaintiff's interest to the defendant, and the defendant's agreement to pay the partnership liabilities, &c., and divide the surplus. That the assets and liabilities were large; that there is a large surplus; that

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the defendant has used the assets for his own account, and has neglected to pay a large debt due from the firm, although a great length of time has elapsed; that the defendant refuses to render any account; that there is a large sum of money due from the defendant to the plaintiff, but the plaintiff says that he is unable to state the amount; and demands an account, and that the defendant pay upon what the accounting may be found due.

The summons is for the relief demanded in the complaint.

The affidavit on which the attachment was granted, states that the defendant is a non-resident, &c., and after setting forth substantially the same cause of action as is stated in the complaint, alleges that there is more than \$25,000 due to the plaintiff from the defendant. A supplementary affidavit states the amount due to the plaintiff at \$22,000.

The statement of these sums in the affidavit is quite inconsistent with the complaint, wherein the plaintiff admits that he is unable to state the amount which is due.

I apprehend he is correct in his statement in the complaint.

It is impossible for the plaintiff to state the sum due without an accounting.

The sum stated by the plaintiff is, beyond doubt, his belief or opinion as to the amount. The grounds of his cause of action, as stated by himself, afford no data from which any fixed, or even approximate sum, can be named as the amount due.

An arbitrary statement or opinion that there is a specific sum due, does not suffice. The facts must be stated which will show that a cause of action exists against the defendant, and the amount of the claim must be specified, and the grounds thereof. (*Code*, § 229.)

In stating the grounds of his claim, the plaintiff herein discloses that he does not know, and cannot know, whether any thing is, in fact, due to him. He has seen no statement of the condition of affairs; he knows not what debts have proved bad, or what depreciation of assets has taken place.

The mere opinion or belief of the plaintiff is not sufficient to warrant the granting of this process.

This view of the case is more fully confirmed by the statements of the answer and the affidavit of the defendant, on which this motion is, in part, founded.

Sherwood *a.* The Mayor, &c., of New York.

The question here raised appears to be novel, and if the plaintiff desires to take this motion before the general term for review, he may have a stay of proceedings until the appeal is decided.

The motion is granted, with \$10 costs of the motion to the defendant.

SHERWOOD *a.* THE MAYOR, &c., OF NEW YORK.

New York Superior Court; Special Term, August, 1860.

MORTGAGOR AND MORTGAGEE.—EFFECT OF ASSESSMENT SALE.

Where mortgaged premises are taken by a municipal corporation for a public improvement, and the whole damages are awarded and paid to the mortgagor, the proceedings being regular, the mortgagee has no right to recover against the municipal corporation the amount of the mortgage. Either the mortgagee's rights as to the land are cut off by the proceedings, or not; and if not, the remedy is by foreclosure.

Dismissal of complaint.

This action was brought to recover the amount of a certain mortgage on two lots now appropriated as a portion of the site for the new reservoir. The plaintiff, who was mortgagee, had no notice of the proceedings, by which the lots were taken into possession by the city except by publication. The commissioners appointed by the Supreme Court to appraise the lands, awarded the value of the two lots to the owner of the fee, without satisfying the mortgage—of the existence of which they were not aware. The owner of the fee obtained the entire award on the coming in of the report of the commissioners, and the mortgagee being left unprovided for, brought this action against the city to recover the value of her interest in the lots, for which her recorded mortgage vouched.

John T. Hoffman, for the plaintiff.

H. H. Anderson, for the defendants.

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WOODRUFF, J.—The facts proved in this case show, in my opinion, that the defendant, or rather that the Croton Aqueduct Board have complied in all things with the requirements of the “act to facilitate the acquisition of lands for a new reservoir in the city of New York,” and that the proceedings of the commissioners also conformed to that act. If so, then the defendants acquired the title to the lands in question, and were only liable to pay to the persons who, by the report of the commissioners, duly confirmed, were found entitled to the sums awarded for the lands.

This is so, unless the act itself is unconstitutional, and if that could be maintained, then the only consequence is, that the defendants, or persons acting for them, and in their behalf, have committed a trespass upon, and taken possession of lands whereof the legal title is in Maria A. Moore, the mortgagor, but on which the plaintiff holds a mortgage.

For this the mortgagee cannot maintain an action against the defendants to recover the amount of her mortgage upon any principle with which I am acquainted.

So if the Croton Aqueduct Board, or the commissioners of assessments, did not comply in all things with the provisions of the act, one of two consequences result. Either the subsequent confirmation of the report by the Supreme Court is conclusive upon the defendants, notwithstanding such omission, or the plaintiff is not affected by the proceedings, and then, as before, she is only in the condition of a mortgagee claiming to recover the amount of the mortgage from a person who (without authority as against her) has entered upon the mortgaged premises, while in the mortgagor's possession, and holds the possession claiming title.

Suppose the mortgagor had conveyed the lot to the defendants, and they had entered under the title so acquired, no such action as the present would lie against them.

But if, in supposing the defendant concluded, I am in error, then I am clear that she has mistaken her remedy. If her rights are cut off by the proceedings in the question, then she is in the same situation she would be if the premises had been sold for assessments—a situation of hardship it doubtless is. But if her rights are not so cut off, her remedy is by the foreclosure of her mortgage. The defendants have acquired

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the title of mortgagor, and by doing this, and taking possession, they have not made themselves liable for the mortgage debt.

The complaint must be dismissed, with costs.

FLOYD *a.* BLAKE.

Supreme Court, Third District; Special Term, September, 1860.

ATTACHMENT.—ACTION FOR THE RECOVERY OF MONEY.

An attachment, as a provisional remedy under the Code, may issue as well in actions to recover damages for wrongs, as in actions of contract, when defendant is not a resident of the State, or has departed with intent to avoid service, or keeps himself concealed with that intent. An action to recover damages for a wrong is deemed an action for the recovery of money.*

Motion to vacate an attachment.

This was an action of assault and battery. The defendant having departed or being concealed, plaintiff procured an attachment, as a provisional remedy under the Code, which the defendant now moved to vacate.

Wesley Gleason, for the motion.

G. F. Batcheller, opposed.

JAMES, J.—It is conceded that this action is to recover damages for an assault and battery. It was commenced by the issuing and delivery of a summons for service, which the officer

* This view is supported by *Ward a. Begg* (18 *Barb.*, 139); and *Hernstien a. Mathewson* (5 *How. Pr.*, 196); but the contrary was held in *Gordon a. Gaffey* (*Ante*, 1). Compare also *Ackroyd a. Ackroyd* (*Ante*, 845). The words, "in an action arising on contract, for the recovery of money," which occur in section 129 of the Code, relating to the form of summons, are construed to mean an action to recover a liquidated demand arising on contract. (*Tuttle a. Smith*, 6 *Ante*, 829, and cases there cited.)

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was unable to serve, and subsequently, upon proof by affidavit that the defendant had departed from the State to avoid the service of said summons, or kept himself concealed therein with like intent, a warrant of attachment was issued, by virtue of which certain property of the defendant was seized, and is held to answer such judgment as may be obtained against him.

The Revised Statutes only authorized attachments against "absconding, concealed, and non-resident debtors," and the seizure of their real and personal property for the payment of debts.

The warrant of attachment given by the Code is not limited to debtors, nor to proceedings for the recovery of debts. It is general in its provisions, and to be in harmony with the general scope and purpose of the Code, must be held as extending to all actions for the recovery of money.

Under the Code the warrant of attachment is a provisional remedy, which the codifiers in their report declared to be "a remedy applied before judgment, with a view of rendering it effectual, whatever it might be, and to be applied at any time during the progress of the suit, and not alone at the commencement, as required by the Revised Statutes." And it was held in *Houghton v. Ault* (16 *How. Pr.*, 79; S. C., 8 *Ante*, 89, *note*), that "an attachment under the Code is not a process for the commencement of an action; it is an order in the action for the arrest of the debtor's property, in the nature of bail, for the payment of such judgment as the plaintiff may obtain."

In respect to the actions wherein an attachment may issue, the Code exhibits a wide departure from the provisions of the Revised Statutes. By the latter the attachment is given only against debtors, while the Code gives it in all actions for the recovery of money.

By the Code, all forms of action are abolished; remedies in the courts are divided into actions and special proceedings, and an action is declared to be an ordinary proceeding in a court of justice. It then declares that "in an action for the recovery of money against a corporation created by or under the laws of any other State, government, or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself, or whenever any person or corporation is about to remove any of his or its property from

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this State, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with intent to defraud creditors, as hereinafter mentioned, the plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of such defendant or corporation attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as the plaintiff may recover" (§ 227); and "the warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is either a foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent, or," &c. (§ 229.) It will thus be seen that this warrant is, by express terms, given in all actions for the recovery of money, and is nowhere limited to actions against debtors, or to such as arise on contract. These provisions can be applied as well in actions of tort as in actions of contract, and with as much propriety and justice. An action of assault and battery is as much an action for the recovery of money as an action for the breach of a contract, and the amount claimed, and the grounds thereof, can as well be stated in the former case, and with as much certainty as can the claim for unliquidated damages in the latter; and if in an action of slander, or assault and battery, the defendant be a non-resident of the State, or if a resident, he has departed therefrom with the intent to avoid the service of a summons, or keeps himself concealed therein with that intent, a case is brought within the very letter and spirit of the Code, which authorizes a warrant of attachment.

The poet has said :

"Who steals my purse, steals trash ; 'tis something, nothing ;
'Twas mine, 'tis his, and has been slave to thousands ;
But he that filches from me my good name,
Robs me of that, which not enriches him,
And makes me poor indeed."

If a good name is so much more to be desired than riches, why should not the law afford the same facilities for enforcing

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a judgment for an assault upon character that it does for an assault upon the purse?

It was urged that in the one case the defendant might be arrested and held to bail, while he could not in the other. It is true that in the one case the order of arrest may go forth, but it is not always effectual. If the defendant be a non-resident, or absent from the State, or keeps himself concealed within it, the order would be of no avail. In such case a defendant with large property within the State might set a plaintiff at defiance, and through the instrumentality of agents, remove or dispose of his property at his convenience, at any time before judgment.

I am therefore of the opinion that an attachment, as a provisional remedy, may issue as well in actions of tort as on contract, whenever it is made to appear by affidavit that a cause of action exists against the person named as defendant, specifying the amount of the claim, the grounds thereof, and that the defendant is not a resident of the State, or has departed from the State to avoid the service of a summons, or keeps himself concealed therein with that intent.

Motion denied.

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New York Common Pleas ; Special Term, December, 1860.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—POWER OF COURT TO
REQUIRE ACCOUNTING.

The power to compel an assignee for the benefit of creditors to account and pay over to the creditors entitled thereto, the moneys and properties realized from the trust, which is conferred upon the courts by the act of 1860 (*Laws of 1860, 595*), is intended to be substantially such as is conferred by law upon surrogates respecting the estates of deceased persons, with the proviso, however, that the same shall not be exercised until the lapse of one year from the date of the assignment.

The court cannot call upon the assignee to account or direct him in any way respecting the distribution of the trust-fund, until the year has expired.

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It seems, that at that time, if he has not closed his trust, a full and final accounting may be had, in which the rights of all persons concerned may be as fully determined as in the ordinary equity action which any creditor may bring to close up an assigned estate and obtain payment of the portion of it to which he is entitled, and distribution may be then directed accordingly.

Application to require an assignee for the benefit of creditors to render an account, and pay accordingly, under the act of 1860.

The facts are fully stated in the opinion.

F. S. Stalknecht, for the petitioner.

T. C. T. Bulkley, assignee, in person.

HILTON, J.—From the petition presented in this matter, it appears that on September 15, 1860, Nelson & Mandel made a general assignment to Thomas C. T. Bulkley, of all their property, for the benefit of their creditors, preferring with others the debt alleged to be owing by them to the petitioner, Adolphus G. Mandel, amounting to \$7,383. It also appears that the assignee, before entering upon his duties, duly executed a bond conditioned for their faithful performance, and approved by one of the judges of this court (see *Laws of 1860*, 595, § 3), in the exercise of the powers vested in them by chapter 198, of *Laws of 1854* (464, § 6), and under which they are authorized to perform within the city and county of New York, and are vested with, all the powers and jurisdiction then or thereafter to be conferred upon the several county courts in this State. (See also *Laws of 1821*, 64; *Laws of 1834*, ch. 119; *Laws of 1839*, ch. 116; *Const. of 1846*, art. 14, § 12. Renard *a. Har-gons*, 3 *Kern.*, 259. *Laws of 1847*, 279, 330, § 36.)

The assignee having realized upwards of \$3,000 in cash, we are asked, under the authority thus conferred upon us by the Law of 1860, entitled "An act to insure to creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors," to order the assignee to appear and render an account of how much he can safely pay at the present time, among the several creditors preferred in the assignment.

The petition having been served on the assignee, he appeared before us, admitting that he has in his hands the amount stated, and which he is willing to pay over to such parties as the court shall declare entitled to it; making no objection whatever to

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the application beyond submitting himself to the protecting power of the court.

Had there been any opposition suggested at the time of making the application, I should not for a moment have hesitated in its disposition; but, under the circumstances, I have considered it advisable to examine the Law of 1860 carefully, for the purpose of seeing whether, under any possible construction of its provisions, a proceeding of this nature can be entertained by us prior to the expiration of one year from the date of the assignment.

The power to compel the assignee to account and pay over to the creditors entitled thereto, the money and property realized from the trust, is intended to be substantially such as is conferred by law upon surrogates, respecting the estates of deceased persons, with the proviso, however, that the same shall not be exercised until the lapse of one year from the date of the assignment (see §§ 3, 4, 5 of the act); and unless the provision in section 4, which gives to the county judge "the same power and jurisdiction to compel such accounting as is now possessed by surrogates in relation to the estates of deceased persons," be considered in terms sufficiently broad and comprehensive to include within it the power conferred by 3 Revised Statutes (5 ed.), 204, section 18, subdivision 1, by which, upon the application of a creditor of a person deceased, at any time after six months shall have elapsed from the granting of letters testamentary, or of administration, the payment of the whole, or any proportional part of the debt owing to such creditor may be decreed;—I can conceive of no case wherein we may call upon the assignee to account, or direct him in any way respecting the distribution of the trust-fund, until the year has expired. At that time, if he has not closed his trust, by paying over and distributing to the parties legally entitled, we may proceed in a summary manner under the act referred to; and having ascertained the amount collected, and the debts owing to the several creditors, may direct a distribution and payment, having regard to any priorities specified in the assignment. But this accounting will not be alone between the assignee and the particular creditor who may see fit to apply to us for payment, but will be a general and final accounting up to the time of its being made, between the assignee and all the creditors in any way, no matter

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how remotely, interested in the trust-fund. In that proceeding it will also be competent for a creditor to impeach the claim of any other creditor, so that the rights of the assignee, and the rights of all persons claiming to be creditors under the assignment, will be thus as fully determined as in the ordinary equity actions which any creditor may bring to close up an assigned estate, and obtain payment of the portion of it to which he may be entitled.

But it is unnecessary to anticipate our future action under the law, as it is clear that the present application is one which cannot be entertained at this early day; only three months having elapsed since the making of the assignment under which the applicant claims.

TOWNSEND *a.* BOGART.

New York Superior Court; General Term, February, 1860.

ARREST.—LIABILITY OF PARTNERS.

In an action in the nature of an action on the case against partners, for obtaining goods from plaintiffs by fraud, a partner who did not participate personally in the fraud, is liable to arrest as well as those who did.

If the affidavits show such a cause of action, it is not to be inferred that the complaint will not state a cause of action of that nature, because the affidavits allege that the action is brought to recover the price of goods sold.

In an action against partners, to recover a debt of the copartnership, in contracting which some of the partners were guilty of a fraud, all the partners are liable to arrest.* WOODRUFF and ROBERTSON, JJ., dissented.

What facts will raise a presumption that a partner was cognizant of, and assenting to fraud committed by his copartners.

Appeal from order made at special term, denying motion to vacate order of arrest.

This action was brought against the three defendants, Bogart, Jefferis & Jackson, to recover for goods obtained from the

* Compare Anonymous (6 *Ante*, 319, *note*); Hanover Co. *a.* Sheldon (9 *Id.*, 240); Claflin *a.* Frank (8 *Id.*, 412).

plaintiffs upon fraudulent representations. Plaintiffs obtained an order of arrest upon affidavits which alleged that the action was brought to recover the price of certain goods, describing them, sold and delivered by the plaintiffs to the defendants on a day and for a price specified, the price whereof became, by the terms of sale, payable thirty days from the time of sale, but that defendants had not paid any part of it; that defendants compose the firm of Bogart, Jefferis & Co., and have been heretofore, and now profess to be engaged in the auction business; that they occupied a spacious store on Broadway, and by conspicuous signs invited the confidence of the business community.

The affidavit then set forth that on July 2, 1859, defendant Jefferis came to plaintiffs' store and asked the price of Pennsylvania Knitting Company's shirts and drawers; that he represented that they had a customer who would buy three hundred dozen of such goods. The plaintiffs refused to sell goods to be sold by defendants at auction, and Jefferis assured them they did not wish them to sell at auction, but had a customer who stood ready to take them at a price named. Upon the faith of these representations plaintiffs sold the goods, and delivered them to defendants.

When the bill became due it was not paid, and on several successive occasions one of the plaintiffs called at defendants' place of business, and on each occasion Jefferis promised that they would make payment in a short time, but they did not do so. On one of these occasions Jefferis being asked whom the goods were sold to, said he could tell, but it would not do any good. He was responsible, but was not known. On further inquiry he acknowledged that he had sent the goods to Baltimore, to one Byerly. He said they were sold on credit, and he would try to get the buyer's note for plaintiffs. Upon this promise plaintiffs gave further forbearance.

This promise being broken, Jefferis subsequently promised to pay cash, and when one of the plaintiffs accordingly called at defendants' place of business, when he saw both Jefferis and Jackson, who both gave him to understand that they had been disappointed in remittances, and Jackson said that he would bring the money to the plaintiffs' store on a specified day, and if it was not paid by that time they would take means to collect,

adding that he would then explain why it was not paid before. On subsequent occasions Jackson assured them that the money was perfectly safe, and there was no need of suing. In answer to an inquiry whether the goods which he had said were sold to Byerly, of Baltimore, were disposed of, Jackson said he did not know whether they were sold outright or not, or whether they could be got back or not, as Jefferis had managed the matter pretty much; and he then called Jefferis in to answer. In answer to the inquiry whether plaintiffs could get the goods back, Jefferis shook his head without saying any thing, and in answer to the question whether they were sold to Byerly, he said they were partly sold and partly not. In answer to an inquiry as to defendants' solvency, he said they relied upon having every cent of their money. He said he could explain his transaction if he chose, but it would do no good. The affidavit also alleged, on information and belief, that the goods were not sold to Byerly.

The affidavits further stated a very similar transaction by the defendants with the house of Britton & Co. at about the same time, in which transaction Jefferis and Jackson were the actors.

On the plaintiffs' affidavits, the defendant Bogart moved to vacate the order of arrest as against himself.

The motion was denied at special term, and the defendant appealed.

Wm. H. Scott, for the appellant.—I. The affidavits upon which the order of arrest was granted, not only failed to show a cause of arrest, but do not even make out a cause of action against the defendant Bogart. 1. The only cause of action set forth in the affidavits is one against the firm of Bogart, Jefferis & Co., on an alleged purchase of goods by the firm. 2. No personal participation by the defendant Bogart in the purchase in question is alleged in the affidavits; on the contrary, his individual name is not mentioned in the affidavits in connection, either with the purchase or with any of the subsequent matters alleged therein. 3. The only ground, therefore, upon which the defendant Bogart can be held liable, in any manner, upon the purchase in question, is that of direct and expressed, or implied and constructive authority on the part of the defendants, Jef-

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feris and Jackson, to bring him thereby. 4. There is nothing in the affidavits showing that Bogart in any manner expressly authorized, or was even cognizant of, the purchase at the time it was made, or at any time after. 5. Nor is any constructive authority on his part shown as to the purchase by the allegation as to partnership. The partnership alleged was for the prosecution of the "auction" business. The legitimate scope and object of the auction business is to sell for others, and not to purchase on individual account. The action being against the defendants upon a firm, and not an individual, purchase; and the only ground upon which the defendant Bogart can be held liable, being that of constructive or partnership authorization thereof, it must appear affirmatively by the affidavits, that the purchase was within the legitimate scope and object of the firm-business. Instead of which it not only appears that the purchase was not within the scope of the business of the firm, but that the plaintiffs were fully cognizant of the nature of that business.

II. But conceding that the affidavits disclose a cause of action, they still fail to show a cause of arrest against the defendant Bogart. 1. The arrest being founded, not upon the mere liability upon the purchase, but upon the fraudulent representations alleged in the affidavit, the defendant Bogart was not liable to arrest, even admitting that he participated in, and was bound by the purchase as a partner, if he did not also participate either directly or by adoption in the fraud of his copartners. 2. There is nothing in the affidavits showing that Bogart, even conceding his knowledge of the purchase, either made, or authorized, or was cognizant of a single one of the representations alleged in the affidavits; on the contrary, his name is not even mentioned in the affidavits in connection with any part of the transaction. 3. Nor can Bogart be held a constructive, if not an actual participant in the fraud by virtue of the partnership merely, there being no implied authority on the part of a partner or other agent to commit a fraud on behalf of his partner or principal, or to bind such partner or principal in any manner thereby. 4. Nor was section 179 of the Code intended to apply to constructive as contra-distinguished from actual fraud. 5. There is nothing in the affidavits showing that Bogart ever adopted the fraud of Jefferis and Jackson in any

way or shape. There is nothing in the affidavits showing that Bogart knew of the fraud practised upon the plaintiffs by the defendants Jefferis and Jackson; or even of the purchase. Nor would adoption of the fraud follow from a knowledge of the purchase, unless accompanied by a knowledge of the fraud. There is nothing in the affidavits showing that the defendants as a firm, or that Bogart as a member of the firm, or otherwise, ever received the goods themselves, or the proceeds thereof, or any benefit therefrom.

John J. Townsend, for the respondents.—I. The appellant admits the truth of all the allegations upon which the order of arrest was granted.

II. The papers clearly show that the defendants were guilty of a fraud in contracting the debt, for the recovery of which this action is brought. It cannot be necessary for the respondent to establish that each one of the three confederates participated actively in each one of the numerous incidents which characterize this fraudulent transaction. It is evident from the whole case, that the defendants purchased these goods with the preconceived design not to pay for them. They used an artifice to deceive and entrap the plaintiffs. They were not merely insolvent, they had no means whatever, or any expectation of any. They shipped the merchandise immediately to Baltimore, and sold or pledged it for half its value. They imposed upon the plaintiffs and the community by the magnificence of their exterior and interior at 157 Broadway. The same fraudulent practices they resorted to with Messrs. Britton & Co. See the affidavits. (*Hall a. Naylor*, 18 *N. Y.*, 588.)

BY THE COURT.*—BOSWORTH, Ch. J.—These goods were sold to the defendants and delivered to them, and the firm has disposed of them. As they were obtained by fraud, an action of trover, or an action on the case for the deceit and fraud, will lie against all, although Bogart, as a matter of fact, was ignorant of the fraud. (*Hawkins a. Appleby*, 2 *Sandf.*, 421-429; *Locke a. Stearns*, 1 *Metc. (Mass.)*, 560.)

* Present, BOSWORTH, Ch. J., and HOFFMAN, WOODRUFF, MONCRIEF, and ROBERTSON, JJ.

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Cary *a. Hotailing* (1 *Hill*, 311) is an authority that trover will lie for the value of the goods on such a state of facts as the evidence establishes.

Affidavits establishing such a cause of action, of themselves authorize an order to arrest and hold to bail. (*Code*, § 179, subd. 1.)

Such a rule as applied to the partner not guilty of actual fraud, is no more severe than the one in force prior to the Code. In an action of trover a defendant was held to bail as a matter of course, without any order of the court or of a judge authorizing it. (2 *Rev. Stat.*, 3 ed., 48, § 8, subd. 4.)

I do not think that the allegation in Yale's affidavit, that this action is brought to recover the price of goods sold, justifies the inference that the plaintiffs' complaint does or will state merely a contract of sale, a delivery, expiration of the term of credit, and non-payment of the price; even if it be assumed, or would be true, that in an action in that form, Bogart could not be held to bail for a debt fraudulently contracted by his partners, he not being a party to the fraud.

These affidavits detail the whole transaction, and I find nothing in the allegations referred to inconsistent with a purpose to declare in such form of action as will secure the right to hold all the defendants to bail. Neither the contents of the summons nor those of the complaint are stated; the affidavits show that the price agreed to be paid is the sum sought to be recovered.

But I think the affidavits should be liberally construed in this respect in favor of the plaintiffs, as they state facts enough to establish a cause of action which of itself gives a right to hold to bail; and as it does not appear that the plaintiffs have not stated or will not state such a cause of action in their complaint, nor that they are precluded by the form of their summons from doing so.

But I am not satisfied that the defendant Bogart cannot rightly be held to bail under subdivision 4 of section 179 of the Code.

I think all the defendants were guilty of a fraud, within the meaning of that section, in contracting the present obligation.

It is well settled that the fraud of one member of a firm in obtaining goods which have gone to the firm's use, is, in judg-

ment of law, the fraud of all, in such sense that an action will lie against all of them for it, and that all are liable for the damages caused by it.

Bogart, as well as his copartners, contracted the debt; and he, as well as the others, was guilty of a fraud in contracting it, for the purpose of every civil remedy to obtain redress for such fraud (unless he be entitled to exemption from being held to bail for it). In the nature of things, he can claim no other exemption, and the question is, Is that secured to him by the Code?

I cannot understand how it is that, on the same state of facts, the judgment of law is, that in an action based solely on the fraud, and to recover the damages caused by it, it is his fraud; but so far as his liability to be held to bail is concerned, he is guiltless of all fraud, and has neither committed nor assented to it. The Code does not, in terms nor by any fair intendment, make any such distinction.

I think the language, "when the defendant has been guilty of a fraud," must be deemed to have been used in subd. 4, § 179, to designate and include all those who, by settled law upon a given state of facts as to the contracting of debt, are the persons contracting it, and who also have been guilty of fraud in contracting it.

It is under this rule of construction that it has been held that a defendant in an action of *crim. con.*, or for seduction, may be held to bail at the suit of the husband or father, as one who has done an injury "to the person" of the plaintiff. (*Code*, § 179, subd. 1; 4 *How. Pr.*, 234; 3 *Code*, 9.)

So long as the law imputes the fraud to him, and for the purposes of the civil remedy of the party defrauded declares it to be his fraud, I think he is as liable to be arrested and held to bail as if he had committed it in intent and in fact. This conclusion finds some analogy in the rule, that although an infant is not liable upon his contracts, yet an action for assumpsit will lie against him for money embezzled, as the court, in furtherance of justice, will look through the form of the action to the tortious nature of the transaction. (1 *Esp.*, 172; 3 *Pick.*, 492; 5 *Hill*, 391.)

On another view, I think he may rightly be held to bail under subdivision 4. I think these affidavits show enough to justify

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the inference, that he knew a fraud had been committed, and assented to it.

The affidavit of Britton shows that the goods bought of his firm were sent to the defendants' store, part on the 27th, and the rest on the 28th of July; they were bought for cash, to be paid on delivery of the goods, and that a bill for the price was sent with them, headed, in writing, "prompt cash;" that these goods were sent to Baltimore by the defendants immediately, and an advance of \$2,000 obtained on them.

The purchase of the plaintiffs was made, and the goods were delivered, on the 2d July, 25 days prior to the purchase from the Brittons. I think the inference a just one, that Bogart, being a partner, and nominally, the actual head of the firm, knew that these purchases had been made, and that the goods had been disposed of by the firm; that they had not been paid for, and that the firm had no means with which to pay for them, and could have had no intention of paying for them at the time they were bought.

It requires great credulity to believe that he was ignorant of the repeated applications for payment made at the store through a period of six weeks, and did not learn, if he did not know when the goods were bought, that they were procured by fraud.

And I think it a just conclusion, from the affidavits respecting the nature of the business which the defendants professed to transact, and that during this period they were not visibly doing any business in that line, that he was aware of and was expecting gains from the fraudulent operations in which all the other partners are shown to have been actively engaged. Jackson and Jefferis were both asked on the 20th of September, if the plaintiffs could not in some way get the goods back. Jackson referred to Jefferis to give the answer, and Jefferis "shook his head without saying any thing." He was then asked if the goods were sold to Byerly. He said, "Yes, partly so and partly not." This is some evidence of a demand of the goods and of a refusal to restore them. The effect of that is not doubtful. (*Holbrook v. Wright*, 24 *Wend.*, 178.)

Bogart does not choose to make any affidavit, or attempt to repel any one inference which would naturally be drawn from the character of these transactions and the fact of his being the head of the firm.

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Under any view suggested, I think the defendant Bogart was rightly held to bail.

The fancied severity of such a rule will find a perfect analogy in many other cases.

Common carriers are liable in an action for an injury to the persons of individuals who may be injured by the negligence of their servants. (*Bostwick v. Champion*, 11 *Wend.*, 571; 18 *Id.*, 175; *Cotter v. Bettner*, 1 *Bosw.*, 490.)

In such an action the defendant may be held to bail by § 179 of the Code.

Whether the negligence was that of one of the parties only, or is that of a servant hired and paid by one partner only, as in *Bostwick v. Champion*, all the partners may be held to bail, although in the one case one partner alone did the wrong; and in the other, neither actually did it or assented to it. They, as well as the parties *actually guilty*, are held to bail, because in law they are all guilty of the wrong, on the same principle and in the same sense that in the present case are all guilty of the fraud practised on the plaintiffs.

I think the order should be affirmed.

MONCRIEF, J.—In my opinion the arrest can be sustained on the affidavits, as establishing a case of trover and conversion, and that the complaint thus formed would be consistent with the affidavits.

Moreover, a case is presumptively made out of adoption, acquiescence, and participation in the fruits of the fraud. I think a partnership raises of itself such a presumption, and the facts here stated strengthen such presumption.

Hence, without saying that a copartner may not be free from liability to arrest in a plain case of entire innocence, and attempt or disposition to redress the fraud, I am of opinion that the arrest should in this case be sustained and the order affirmed.

WOODRUFF, J., dissenting.—The affidavits upon which the order to arrest the defendants in this action was founded, state that “the defendants compose the firm of Bogart, Jefferis & Co., and have been heretofore, and now profess to be engaged in the auction business in the city of New York;” that goods were purchased

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from the plaintiffs by the defendant Jefferis in the name of the firm of Bogart, Jefferis & Co., and professedly for their benefit; that purchase is shown to have been made by gross misrepresentations, and a most aggravated fraud in procuring the goods is shown to have been perpetrated by Jefferis; and enough is shown to indicate very clearly that the defendant Jackson was a party to the fraud, and was active in the endeavor, by repeated false representations, to quiet the apprehensions of the plaintiffs, induce the belief that the goods would be paid for, and so prevent their resort to legal measures for redress.

An order of arrest having been obtained against all of the defendants, the defendant Bogart moves to discharge that order so far as it relates to himself, on the ground that it does not appear that he has been guilty of any fraud, or that he is liable to arrest in this action for the fraud of Jefferis and Jackson.

It is clear that when goods are purchased for, and come to the use of a copartnership by means of the fraud of one of the partners, no title to the goods is acquired thereby, and trover may be brought for the conversion thereof, or the goods may be replevied. Or an action on the case will lie for the deceit practised by one of the partners to obtain the goods.

If the goods are in the possession of the firm, or if they have been converted to the use of the firm, the action of trover will lie against all of the partners.

And even if no benefit has been derived by the firm, or by the innocent partners, from the fraud, still, if the fraud was committed by the others while acting within the scope of the copartnership business, it has been held that all are liable for the damages sustained thereby, even though some were ignorant of the fraud.

The principle upon which this rests is stated in *Hawkins a. Appleby* (2 *Sandf.*, 428) to be, that by forming the connection, partners pledge themselves for the good faith of each other, and impliedly agree to be responsible for what they shall respectively do within the scope of their copartnership business. (See the cases there cited, and *Collyer on Part.*, book 3, ch. 1, §5; *Parkin's ed.*, 401-413, §§ 445-456; *Cary a. Hotailing*, 1 *Hill*, 313.)

And the principle is supposed to be the same as that which holds all the partners liable for the negligence of one in the conduct of the copartnership business. (*Bostwick a. Cham-*

pion, 11 *Wend.*, 571; 18 *Ib.*, 175; *Cotter a. Bettner*, 1 *Bosw.*, 490; *Moreton a. Hardern*, 4 *Barn. & Cr.*, 223; and see also 15 *Mass.*, 75, 331.)

But to maintain trover against all the partners for goods fraudulently purchased, or an action on the case for the deceit, it must appear that the goods came to the possession and use of the copartnership, or that the purchase was within the scope of the copartnership business, or that the act of fraud by which the damages complained of were caused, was within the power and authority conferred upon the fraudulent partner, either express or implied from the nature of the copartnership. This will be found to lie at the foundation of all the cases which hold one partner liable for the fraud of the other.

If the present action was an action of trover for the wrongful conversion of the plaintiffs' goods, or was an action on the case for the deceit practised by the defendant Jefferis, the propriety of the order to arrest all of the defendants would depend on the single question, whether the plaintiffs have shown that such action can be maintained against them all. Showing such cause of action, shows at the same time a right to have the defendants arrested in the action founded thereon. (*Code*, § 179, subs. 1, 4.)

But the plaintiffs' affidavit states distinctly that this is an action "brought to recover the price of 300 dozen knit shirts and drawers, sold and delivered by the plaintiffs to the defendants."

It is, therefore, not an action of trover for the wrongful conversion of the plaintiffs' goods.

It is not an action on the case for false representations, fraud, or deceit, to recover the damages sustained thereby.

It is not an action of tort in any form or by any name, unless we are to assume that the affidavits are founded in mistake, and do not truly represent in legal terms the nature of the remedy the plaintiffs are pursuing.

But it is an action affirming the sale of the goods as a valid sale. It seeks to recover the price as a debt due by the defendants to the plaintiffs upon and for such sale.

That the defendants are all liable upon a contract of sale made in the name of all, and for goods delivered to all, is not questionable.

And if it be true in fact, as is somewhat loosely and generally

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stated in the affidavit, that the goods were "delivered to the defendants," they may be all liable for the price, whether the purchase was within the scope of the copartnership business or not.

The same principles which would make them liable in trover, where trover would lie against all, or in an action for the deceit when that could be sustained against all, would, *a fortiori*, establish their liability for the debt.

But establishing a joint liability for the debt, does not, *per se*, entitle the plaintiffs to hold the defendants to bail. In an action of trover, or an action on the case for deceit, it is enough to show a cause of action against all, and the right to hold to bail follows of course; but here proving the debt only shows a joint liability to such consequences as flow from the recovery of a judgment for money due on a contract, and these do not include a liability to arrest. Something more—some extrinsic facts, not appearing by the record—must be shown.

Bogart may therefore be liable for the debt—a cause of action may be established, *prima facie*, against him, and he may be liable to all the consequences which flow from showing a joint liability with his partners for a demand accruing in the copartnership business, upon a contract made in the name of the firm, and still not be liable to arrest in this action for his partners' fraud.

I am not prepared to say that, where a plaintiff affirms the contract of sale, and founds his action thereon, and shows the fact of the defendants' copartnership, and so their joint liability for the price, each of the copartners is liable to be held to bail, because the purchase was obtained by the fraud of one of them.

The only provision of the Code under which, in such case, the defendants can be held to bail, is subdivision 4, of section 179, which imposes the liability to arrest "when the defendant has been guilty of a fraud in contracting the debt for which the action is brought."

I apprehend that this does not mean that every defendant who is liable for the debt shall be liable to arrest, when one only committed the fraud, and the others are innocent. It is the defendant "who has been guilty of the fraud" that may be arrested. If it were not so, then all joint makers of a note

might be arrested, though some of them were in truth makers for accommodation, or sureties for the rest, if the latter by fraud procured it to be discounted.

There may be many persons liable for the same debt, and by force of the same contract, but it is opposed to the legislation of this State, for nearly thirty years, to hold any debtor to bail, and subject him to imprisonment, unless he is himself guilty of some fraud.

The construction of this subdivision of section 179 must be, in this respect, the same as the next following, which provides that the defendant may be arrested when he "has removed, or disposed of his property, or is about to do so with intent to defraud his creditors." It would hardly be claimed, I think, by any one, that, in an action against three partners, on a co-partnership note, all of them could be held to bail on proof that one of them had disposed of his property to defraud his creditors.

And in the present case, if it were conceded that all of the defendants are liable to the plaintiffs for the price of the goods, they cannot, in my opinion, be all held to bail in an action on the contract to recover that price, unless the proof also shows that they are all parties to the fraud. No one but he or they who are "guilty of the fraud in contracting the debt," are liable to the arrest in such an action.

This being an action on the contract, in affirmance of the sale, and to recover the price; the plaintiffs must, to sustain the order of arrest as against the defendant Bogart, show two things:

First, that he is liable in the action for the price of the goods; and, *second*, that he has been guilty of a fraud in contracting that liability.

Under this latter proposition it may, however, be conceded, that if with knowledge of the fraud he assents to, and adopts the purchase, or receives the benefit of it, he is a fraudulent debtor within the meaning of the clause in question.

The goods in question do not appear to have been purchased in or for the business in which the copartnership was engaged. That was the "auction business." That is not shown to embrace the purchase of goods at all. It is not shown that prior to the purchase in question the firm of Bogart, Jefferis & Co.

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had ever purchased any goods. They had received consignments of goods for sale at auction, and had sold them. They had been employed by the plaintiffs to sell goods at auction, and for all goods consigned to them by the plaintiffs, and sold, they had duly accounted and paid.

The affidavits fail to show that the purchase of goods was within the scope of the copartnership business, or that Bogart was cognizant of the fraud, or that he ever assented in any manner to become a party thereto.

If it were conceded that the words of the plaintiffs' affidavit, which, in general terms, states that the "goods were delivered to the defendants," in connection with the fact that they were disposed of, sufficiently shows that the goods came to the use of the firm so as to make the partners liable in trover for their value, or in assumpsit for their price; still, if the action be brought in affirmance of the sale, and for the price of the goods as a debt due by the firm, the extrinsic fact that the defendant Bogart was guilty of a fraud in contracting the debt, is wanting. It is not shown that he was aware of the representations by which the goods were procured, nor that he at any time assented to the purchase with any such knowledge. Nor is it even shown that he ever had actual knowledge that the goods had been purchased or disposed of.

Being one of the partners, he may no doubt be assumed to know what goods are purchased in the copartnership business. It not being shown that this purchase was within the scope of the partnership, that presumption does not arise here. If the goods were in fact delivered at the defendants' store, it does not follow that Bogart knew that Jefferis had committed any fraud in procuring them, or that he committed any in disposing of them: still less that he knew they were procured or disposed of without intent to pay for them.

I am conscious that the case made by the plaintiffs' affidavits may warrant the suspicion that Bogart was a party to the fraud, but an order of arrest ought not, I think, to be made on suspicion. Those affidavits may, perhaps, by some be regarded as showing, *prima facie*, that he was cognizant of the fraud, and assented to it. If the purchase and sale of goods had been within the scope of the copartnership, or it had appeared that he knew that the goods were purchased in the name of the

firm, or it had appeared that the goods were appropriated to the use of the firm with his assent, I should incline to that opinion. In such case he must be deemed to have been so far acquainted with the business of his own firm as to know that the goods had not been paid for, and also to know that the proceeds of the sale thereof were not applied to that payment, and that the purchase was made without the means of payment; and his acquiescence under such circumstances would tend strongly to show that he was a party to the whole fraud, and would at least warrant the continuance of the order, when he, by no affidavit or proof, denies his complicity in the fraud.

The proposition upon which I insist is, that in an action on the contract for the price of the goods, a partner who has not been guilty of the fraud as an actual participator therein, nor by assenting to or adopting the purchase with knowledge of the fraud, cannot be held to bail. I think that the affidavit of the plaintiff in this case ought to be taken to mean what it says; and that this is, what the plaintiff swears it is, an action founded on a sale, and to recover the price agreed to be paid.

I do not appreciate the suggestion, that wherever trover would lie against all to recover goods purchased fraudulently by one partner, there each may be held to bail in an action on the contract of purchase.

The Legislature have seen fit to permit the holding to bail in all actions of trover, whether the right to maintain the action arises out of a fraud or not. And so they have permitted an arrest wherever an action on the case, for fraud in obtaining property, will lie. But they have not permitted an arrest in an action on the contract, for the price, on mere proof that the action will lie.

If it were conceded that the plaintiffs had a choice of remedies, *i. e.*, to sue in trover, and hold all the partners to bail, or to sue on the contract, and hold those only to bail who were guilty of the fraud, I perceive no legal absurdity in the result.

And when the Legislature, in subdivision 4, of section 179, provided that in an action on contract, the defendant who had been guilty of a fraud in contracting the debt, or incurring the obligation, might be held to bail, I think they meant a defendant who had been guilty of actual fraud, and not one who

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might have incurred a responsibility in some other form, for the fraud of a partner.

ROBERTSON, J., also dissented.

JACKSON *a.* MERRITT.

Supreme Court, First District ; Special Term, April, 1860.

ARBITRATION.—UMPIRE.

A submission to arbitration submitted the controversy to two arbitrators, with authority "to select a third party not interested," &c., "to decide any point of disagreement between them, whose decision shall be final."

Held, that in case of a disagreement, it was essential to the validity of the award that it should be signed by the umpire selected.

Motion to confirm an award.

The parties in this case agreed to submit their matters in dispute to the arbitrament of two gentlemen, with authority "to select a third party, not interested in the ice business, to decide any point of disagreement between them, whose decision shall be final."

The two arbitrators named in the submission afterwards executed an award, in which it is stated that they "have, by the appointment of Mr. Geo. Harris, as third and final arbitrator, decided," &c. The "third arbitrator" did not sign the award, and it appeared by affidavit, as well as by the face of the award, that he actually acted in the matter, and that the decision which was signed by the two arbitrators named in the submission, was made upon the judgment or decision which the "third party" made upon the case.

The party selected as third man was not sworn, nor did he hear the proofs and allegations of the parties.

LEONARD, J.—It is quite evident, that the article of submission contemplates the final decision of a "third party" only, in

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case the two named as arbitrators should disagree. If they disagree, it is the decision of the other man selected which is to finally control. The signatures of the other two arbitrators to the award are not of the least consequence, after a disagreement between them and the selection of a "third party." The execution of the award by them with the "third party" would not vitiate it—it would be surplusage. But the signature of the third party is essential, and without it, there is no award, within the terms of the submission.

This view is supported by the case of *The Mayor, &c., of New York v. Butler* (1 *Barb.*, 333).

The award which is signed purports to be the report of a decision which has been made in the matter by a "third party," who does not himself vouch for the decision.

The award made is void. There is nothing to be confirmed, and nothing to vacate. There is no legal award.

TRINITY CHURCH *a.* COOK.

Supreme Court, First District; Special Term, December, 1860.

ASSESSMENT.—LEASE.—COVENANT TO PAY ASSESSMENT.

Under a lease providing that the lessee shall bear all assessments imposed on the premises during the term, if a part of the premises are taken for a public improvement, and damages therefor assessed to the owner and to the lessee respectively, for their interests, the assessment for benefit laid upon the residue of the premises must be borne wholly by the lessee.

Demurrer to answer.

The action was brought by the lessors of premises in the city of New York, to recover from the assignee of the lessee an assessment which the lessors had been compelled to pay.

This complaint alleged, that on April 21, 1852, the plaintiffs, by indenture of lease, demised to one Schwartz a lot of land on

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the northerly side of Reade-street, for the term of twenty-one years, from May, 1852, and the lessee, for himself and his assigns, covenanted that he or they would "bear, pay, and discharge all such duties, taxes, assessments, and payments, of whatever nature or kind soever, as should, during said term, be imposed on or grow due or payable out of, or for or by reason of the said demised premises, or any part or parcel thereof;" that on April 22, 1852, the lessee assigned the lease and term to the defendant, subject to the covenants in the lease, and defendant accepted such assignment and entered upon the premises; that in May, 1856, an ordinance was passed for widening Reade-street, on the northerly side, and by regular proceedings, according to law, the part of said demised premises not taken for such widening was duly assessed for benefit derived from such widening, the sum of \$2,000; which assessment, on March 26, 1859 (on the confirmation of the commissioners' report), was imposed on and grew due and payable out of and for and by reason of the part of the demised premises not taken for the widening; that defendant was then assignee and holder of the lease and demised term, and plaintiffs, on December 10, 1859, made demand on him to pay the assessment, which defendant omitted to do; and plaintiffs were obliged to pay, and on February 29, 1860, did pay the same. Judgment was demanded for that sum, with interest.

The defendant answered, alleging that the Commissioners of Estimate and Assessment in said proceedings, did not assess him for any benefit or advantage to his interest in the premises, but they awarded to plaintiffs, as reversioners, for damage to said lot, \$1,750, and assessed them, for benefit in respect to said lot, \$2,000; and that the defendant, before the commencement of this action, tendered to plaintiffs \$195 for the excess of the assessment over said award, calculated as to the balance of the lot, after deducting the part taken for the improvement; which plaintiffs refused to receive.

To this answer plaintiffs demurred.

G. M. Ogden, for plaintiffs.

James T. Brady, for defendant.

BONNEY, J.—The question raised and argued in this case, is

whether or not the covenant in the lease above mentioned applies to and makes the lessee or his assigns liable to pay the said assessment of \$2,000 for the widening of Reade-street. The covenant is, "that the lessee and his assigns shall and will bear, pay, and discharge all such duties, taxes, assessments, and payments of what nature or kind soever as shall, during the term, be imposed on or grow due or payable out of or by reason of the said demised premises, or any part or parcel thereof;" and the statement in the complaint (which is not denied), is that by said proceedings for widening Reade-street, taken while defendant was assignee of said lease and term, this assessment of \$2,000 was imposed on, and grew due and payable out of and for and by reason of the part of the demised premises not taken for said widening.

This statement brings the assessment clearly within the terms of the covenant, which runs with the land and binds the assignee (*Astor v. Hoyt*, 5 *Wend.*, 603; *Astor v. Miller*, 2 *Paige*, 69; *Kearney v. Post*, 1 *Sandf.*, 105; *Childs v. Clark*, 3 *Barb. Ch.*, 52); but defendant says the commissioners did not assess him for any benefit to his interest in the premises, but they awarded to the plaintiffs, as reversioners, for damage to the premises, \$1,750, and assessed them, for benefit in respect thereto, \$2,000; and he insists that these facts relieve the defendant from the obligation of the covenant.

The act to reduce several laws relating particularly to the city of New York into an act passed April 9, 1813, provides (§ 178), that in cases of opening or widening streets, &c., the commissioners appointed for that purpose shall make an estimate and assessment of the damage (if any) over and above the benefit, or of the benefit (if any) over and above the damage, as the case may be, to the respective owners, lessees, and persons respectively entitled to, or interested in the lands required for the purpose of the improvement; and in making their report, shall state and report the excess and surplus only of the damage over benefit, or of benefit over damage, as the case may be, to such owners, lessees, and persons respectively; and (§ 181) that when part only of any lot or premises, then under lease or other contract, shall be taken for the improvements, all contracts and engagements respecting the same shall, upon the confirmation of the report, cease and be discharged as to the

part so taken, but remain valid as to the residue; and the rents or payments reserved or payable in respect of the same, shall be equitably apportioned.

Under this act, if now in force, it is conceded that the defendant would be liable to pay the excess of damage over benefit which would have been assessed and reported by the commissioners against the plaintiffs, as owners of the premises subject to the lease.

By the act passed April 20, 1839, to amend the act before mentioned (*Laws of 1839, 182*), it is provided (§ 3) that it shall be the duty of such commissioners to report fully and separately the amount of loss and damage, and of benefit and advantage to each and every owner, lessee, and person entitled to or interested in any lands or premises required for the purpose of any such improvement, and so much of the act of 1813 as is inconsistent with the provision is (by § 13) repealed.

The defendant now insists that the amount which, by and under the proceedings in question, has been awarded and paid to the plaintiff, as stated in the answer, for damage by reason of said proceedings to their estate and interest in the premises described in said lease, should be deducted from the amount assessed upon such estate and interest, and the balance of said assessment only (or rather an equitable part of such balance) should be charged upon the defendant.

I can see no ground for sustaining this position. This lease was made since 1839, and it is to be presumed with reference to this law, passed in that year. It is conceded that the proceedings for widening Reade-street have been regular, and that the law authorizing and regulating such proceedings has been observed and executed. It follows, that in that part of the demised premises taken for the improvement, there has been awarded and paid to defendant the value of his lease with interest thereon, and to plaintiffs the value of their estate, subject to said lease. In relation to the residue of the premises, there has been assessed and reported the amount of benefit to the defendant as lessee (if any), and to the plaintiffs as owners, subject to the lease, of such residue. And the rent to be paid by defendant to plaintiffs under the lease, subsequent to the improvement, has been or will be equitably apportioned. The part of the premises taken for the improvement must, I think, be regarded

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as entirely out of the case. That part has been, by superior right (that of eminent domain), taken from both these parties, and both have been paid for their respective estates and interests therein. The lease, with all its covenants, remains in full force as to the residue of the premises; and the amount of rent to be paid for such residue, from the time of the improvement to the end of the term, has been equitably adjusted; and the question now presented must be, in my opinion, decided in the same way as if this residue had been the whole premises originally demised. As I understand the case, it is conceded that this assessment of \$2,000 is imposed upon and payable by reason of said residue of the demised premises remaining subject to the lease; and it is not alleged that any sum has been paid or awarded to the plaintiffs as owners, or by reason or on account of said residue.

In my judgment, the covenant in the lease applies to and includes this assessment, and makes the defendant liable therefor; and the statements of the answer are not sufficient to relieve him from such liability, or to entitle him to any deduction from the amount claimed against him.

The plaintiffs must have judgment on the demurrer, with leave to the defendant to amend his answer in twenty days on payment of costs.

BANK OF BELOIT *a. BEALE.*

New York Superior Court; Special Term, June, 1860.

ELECTION OF REMEDIES.—ESTOPPEL.—JUDGMENT FOR PURCHASE-MONEY A BAR TO CLAIM OF TITLE.

Where one who is intrusted with property misapplies it, if the creditor, instead of suing for the conversion, proceeds upon the contract, and recovers judgment thereon, he waives all claim of title to the property and its proceeds.

After an agent intrusted with money for the purchase of merchandise, converted the merchandise, the owner, with knowledge of the fact, sued him to recover the amount with interest, and had judgment, on which he charged the debtor in execution.

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Held, that the judgment and execution estopped the plaintiff therein from claiming the property or proceeds, and that payment to him, was no defence against the claim of the party to whom the agent had transferred the property.

Motion for new trial, on the minutes of the judge.

The plaintiff having recovered a verdict in this action on the 14th day of June, 1860, the defendants, June 16, 1860, moved on the judge's minutes for a new trial.

This action was brought on the allegations that the plaintiff, in the early part of 1858, consigned to the defendants a specified quantity of wool, to be sold for and on account of the plaintiff, for cash; that the defendants received and sold the wool, but paid only \$2,000 of the proceeds to the plaintiff, and refused to pay the balance. The complaint demanded judgment for the residue of the proceeds, which, including interest, the jury found to be \$5,553.57.

The defence relied on was, that one B. A. Sweet owned the wool; that it had been purchased for him, in Wisconsin, by one M. W. Sherwood, and with Sweet's money, on an agreement with Sherwood to forward it to Sweet, at Albany; that instead of doing so, Sherwood transferred it to plaintiff as security for antecedent advances, with notice of the rights of Sweet; that Sweet notified the defendants that the wool was his, and demanded that the proceeds of it be paid to him, and that they had in part paid him such proceeds, except the \$2,000 which they had paid to the plaintiff.

The defendants, to show that the wool was Sweet's, and that the plaintiff took it under circumstances giving him no right to it, called M. W. Sherwood as a witness.

On his being sworn, it was proved that he was then in the custody of the sheriff of Saratoga county, on an execution against his body, issued on a judgment recovered against him by said Sweet, in the Supreme Court of this State, on the 14th day of February, 1860, for \$4,334.43 damages, besides costs. That said Sherwood was so produced as a witness under a *habeas corpus ad testificandum*.

The judgment-record of the suit of Sweet *v.* Sherwood, was put in evidence.

The summons stated that in case of failure to answer, "the plaintiff will take judgment against you (Sherwood) for

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\$3,923 $\frac{3}{4}$ %, with interest from the 14th day of July, 1858, besides costs."

The complaint, which was verified on the 7th day of September, 1858, stated, that prior to the 9th of June, 1859, Sweet "employed" Sherwood as his agent to purchase 20,000 pounds of wool for Sweet in the State of Wisconsin, and forward the same to Sweet, at Albany, "Sweet agreeing to pay to Sherwood" either one-half the profits made on the sale of the said wool, or one cent per pound commission for "Sherwood's services, as he, the said Sweet, might elect."

That for that purpose Sweet, between the 9th of June and the 14th of July, 1858, furnished and advanced to Sherwood \$6,000, and also one hundred and five wool sacks, of the value of \$52 $\frac{5}{8}$ %. That with a portion of said moneys Sherwood purchased and forwarded to the said Sweet thirty-four bales of wool, containing 7,041 pounds, purchased for him, as the said Sweet is informed and believes, and amounting in value to the sum of \$2,112 $\frac{3}{8}$ %. That he also returned thirty-four of the wool sacks, of value of \$17.

That with the remainder of the moneys so furnished by "Sweet to Sherwood," Sherwood "purchased wool in his own name, and sold and assigned the same, together with the remainder of the said wool sacks," to other parties; that he has refused, and still refuses to deliver the last-mentioned wool to Sweet, or to furnish and deliver the wool purchased with the moneys so advanced by Sweet, "and also refuses to refund or return the moneys so advanced and furnished by said Sweet," after deducting therefrom the amount thereof expended in the purchase of wool delivered by "Sherwood to Sweet, or to render any account there of to" Sweet.

It alleges a demand by Sweet upon Sherwood of the moneys not expended in the purchase of wool delivered by Sherwood to Sweet, and an account thereof, and that Sweet "has also demanded the wool purchased therewith, but has been unable to obtain the said moneys or an account thereof, or the wool purchased therewith," and prays judgment for the sum of \$3,923 $\frac{3}{4}$ %, with interest from the 14th of July, 1858, with cost of this action.

The defendant put in an answer verified November, 1858.

The action was referred to and tried before a referee, who,

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by his report, dated February 9, 1860, found upon the pleadings and evidence, that the facts substantially as stated in the complaint are true; and stated, in conclusion, that "there can be no doubt that the plaintiff is entitled to recover the money advanced, less the proceeds of the wool received with interest from the time of last advance, July 14, 1858. This amount is \$3,923.20, with interest to December 28, 1859, (1 year, 5 months, 14 days, \$411.23), making in all \$4,334.43, for which sum the plaintiff should have judgment.

The defendants in this suit, in order to show that the wool in question was the property of Sweet, and that they were justifiable in paying the proceeds arising from the sale of it to him as such owner, after he had given notice of his title and demanded such proceeds, offered to prove the facts stated in the complaint in the suit of Sweet *a. Sherwood*.

Mr. Carter, for the motion.

E. P. Clark, I. O. Miller, and S. Sanxay, opposed.

BOSWORTH, CH. J.—It will be seen on examining the complaint in the suit of Sweet *a. Sherwood*, that Sweet's whole claim is:

(1) For cash advances	\$6,000.00
(2) For 105 sacks furnished	52.50
Total	<u>\$6,052.50</u>
He credits Sherwood for wool delivered . . .	\$2,112.30
For 32 sacks returned	17.00
Total	<u>\$2,129.30</u>

The complaint prays judgment for \$3,923.20, with interest from July 14, 1858.

The summons states that in case of failure to answer, judgment will be taken for that sum and costs. A summons in that form is proper only "in an action arising on contract for the recovery of money only." (*Code*, § 129, subd. 1.)

The complaint sets forth the contract between Sweet and Sherwood, and alleges, as a breach of it, the refusal of Sher-

wood to deliver the wool purchased, as well as his refusal to refund the money or account for it. By the suit which he brought, he elected to proceed on the contract and claim a return of the money advanced, with interest thereon.

He cannot, on the same facts, have a judgment against Sherwood for the amount of money furnished and interest, and also for the value of the property bought with such money.

By bringing a suit upon the contract, and claiming and recovering a part of the damages arising from a breach of it, the moneys advanced with interest, he repudiates the use which Sherwood made of the money as one which was unauthorized, and absolutely waives all claim of property in the wool bought with it. After such a recovery, he could not maintain trover against Sherwood for converting the wool.

Such a transaction is, in principle, like that between vendor and vendee, where the latter, by fraud, induces the former to sell and deliver goods on credit. In such a case, if the vendor, with knowledge of the fraud, sues the vendee upon the contract of sale and recover judgment, he cannot, in a subsequent action, based on the fraud, pursue the goods or their proceeds either in the hands of such vendee or of a third person. (*Lloyd a. Brewster*, 4 *Paige*, 537.)

It seems to me clear, upon elementary and fundamental principles, that the action which was brought by Sweet against Sherwood, and the recovery of judgment therein, estops Sweet from claiming property in the wool bought with the moneys for which such judgment was recovered. All causes of action based on the transaction are merged in the judgment recovered.

In addition to this difficulty, which seems to be insuperable, Sweet has so far executed the judgment, that he has Sherwood in custody under an execution against his body, issued on such judgment. This is a satisfaction of the judgment in such sense that while the imprisonment lasts, no proceedings can be taken against his property to obtain judgment.

The judgment on which he is imprisoned will not be set off against any other judgment in his favor. (*Cooper a. Bigalow*, 1 *Cow.*, 57.) A creditor's bill will not lie on such a judgment to reach his equitable estate. (*Stilwell a. Van Epps*, 1 *Paige*, 615.) Nor will an action lie against the sureties in a bond given to stay the issuing of an execution ninety days, although

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conditioned to pay the damages and costs with interest before or at the expiration of ninety days. (*Sunderland v. Loder*, 5 *Wend.*, 58.)

A consent that the debtor go at large is an absolute discharge of the judgment. (9 *Cow.*, 138.)

I think there is a marked distinction between a case like this, and an owner of a chattel suing one person and recovering against him in trover for converting it, and subsequently suing another person for a separate and distinct conversion of the same property.

In this State it is held that a judgment against one, and his imprisonment without actual satisfaction, is no bar to a subsequent action against the other.* (*Osterhout v. Roberts*, 8 *Cow.*, 43.)

The rule in England is otherwise, and it has recently been held there, as it was held in *Brown v. Wooton* (*Cro. Jac.*, 73), that a recovery in trover for a permanent conversion vests title in the defendant by relation from the time of the conversion. (*Buckland v. Johnson*, 26 *Eng. L. & Eq.*, 328.)

This is not the case of an owner suing a second party for converting his property, after having obtained judgment and execution against another party for a separate and distinct conversion of the same property.

In this case, after Sherwood had sold and disposed of the wool, Sweet, with knowledge of the fact, sued him to recover back the money advanced to purchase it, and recovered a judgment for such moneys with interest; and Beale and Adams, who received the wool from the plaintiff (to whom Sherwood had transferred it) to sell on the plaintiff's account, instead of paying the proceeds to the plaintiff, paid them to Sweet, and insist that the wool was his, and that they had a right to pay the proceeds to him, he having demanded them as owner.

* See also *Robinson v. Weeks* (6 *How.*, 161). Opposed to this doctrine are, *White v. Philbrick* (5 *Greenf.*, 147); and *Campbell v. Phelps* (1 *Pick.*, 62); see also *Marsh v. Pier* (4 *Rawl.*, 286); *Murrell v. Johnson* (1 *H. & M.*, 449); and *Broom v. Wooton* (*Yelv.*, 67). In *Curtis v. Groat* (6 *Johns.*, 168), it was held, that a recovery in *trespass quare clauum fregit*, for cutting down wood of the plaintiff, which defendant converted into coal and left on the land, did not transfer the title to the coal to the trespasser. In order that recovery and execution should have the effect of transferring the title, the recovery must be for the specific chattel. To the same effect is *Betts v. Lee* (5 *Johns.*, 348).

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If the judgment recovered by Sweet against Sherwood estops the former from claiming ownership of the wool as against the latter, it also estops him from making such claim as against the plaintiff.

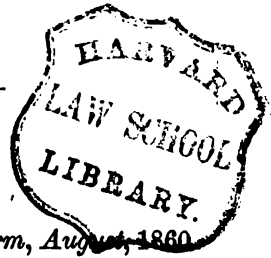
Beale and Adams' defence is based solely on the right of Sweet to claim the proceeds of the wool as against the plaintiff; and if he cannot sustain such a claim they have no defence.

I think Sweet's rights are merged in his judgment, and the remedies provided by law to obtain payment of it; that in contemplation of law it is to be treated as satisfied while the imprisonment of Sherwood is continued, and that the motion for a new trial should be denied.

Motion denied with \$10 costs.

BULEN *a.* BURDELL.

Superior Court, First District; Special Term, August, 1860.



PARTITION.—LIEN FOR ADVANCES TO DEFEND ESTATE.—AMENDMENT OF COMPLAINT.

One of several heirs who maintains proceedings for the protection of the estate, on the promise of the others to share the expense, does not acquire thereby a lien for disbursements so incurred against their interests in the estate, which can be recognized in his action for partition.

It seems, that after trial the court should not allow the complaint to be amended by inserting allegations of a further claim, the facts of which were known to the plaintiff before the commencement of the action.

Motion for leave to amend complaint.

The facts are stated in the opinion.

John Rankin, Jr., and Samuel J. Tilden, for the motion.

Winchester Britton and Charles Edwards, opposed

BONNEY, J.—This action was commenced in January, 1858, for partition of two lots, with buildings, on Bond-street, in the

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city of New York, formerly owned by Dr. Harvey Burdell, who died in January, 1857. The plaintiffs, in right of Mrs. Bulen (who was a half-sister of Dr. Burdell), claim to be owners, as tenants in common with others, of one-eighth of said premises, subject to a mortgage made by the deceased on one of the lots; which mortgage, since the commencement of this action, has been foreclosed and the mortgaged premises sold. The complaint states the rights of the respective parties in the premises, and the liens thereon, and prays for the usual judgment in partition cases.

In June, 1858, the usual order of reference was made in the action to take proof of the matters set forth in the complaint, and ascertain and report the rights and interests of the parties in the premises, and the referee (as it is stated) made a draft of his report on or before July 29, 1859, which was submitted to the plaintiffs' attorney, who has taken no further proceeding in the action.

The plaintiffs now move for an order to amend their complaint, by inserting therein statements to the effect that, in the proceedings before the surrogate of the county of New York in relation to the administration of the personal estate of the said deceased Harvey Burdell, Mrs. Cunningham claimed to be the widow of said deceased, and the plaintiff, George D. Bulen (who then, with the assent of the other heirs of said deceased, had charge of said real estate), acting in behalf of himself and his wife, and for the benefit of the other heirs and next of kin of said deceased, and to protect and save the real as well as personal estate which was of said deceased, for said heirs and next of kin, contested said claims of Mrs. Cunningham; that William Burdell agreed to bear equally with him the necessary advances for defeating said claims, but has failed to do so; that it was agreed between the plaintiffs that the expenses of that litigation, which was for the benefit of the separate estate of Mrs. Bulen, plaintiff, should be for the account of, and charged against said estate; that the expenses of that litigation, and the liabilities incurred therein, amounting to \$4,120.97, besides interest, were necessary and reasonable, and were paid and incurred in good faith for the protection of the real estate which was of said deceased, as well as for the purposes of said proceedings before the surrogate, and were, as the plaintiffs believe,

necessary for the safety of said real estate, and to preserve the same to the heirs of said deceased; and thereupon plaintiffs insist that for the said amount of \$4,120.97 and interest, they have a claim upon and against the said real estate, and the heirs of said deceased, precedent to any and all liens made by said heirs on said estate, and prior to the rights of any mortgagee, grantee, or creditor of any of said heirs.

The application to amend is opposed by several of the defendants; and after examination of the question, I am of opinion it must be denied. All the facts now proposed to be inserted by way of amendment in the complaint, were known to the plaintiffs when the action was commenced, and no reason is shown for their not being then set forth; and under such circumstances, the motion to amend after the suit has been pending nearly two years, is not entitled to favor.

But the fatal objection to the motion is, that the facts proposed to be stated, if the statement was inserted in the complaint and admitted, would not, in my opinion, entitle the plaintiffs, or either of them, to any relief in this action. Certainly these statements do not make out a lien in favor of the plaintiffs upon the premises in question, or any part thereof; nor can I see that they establish any claim, legal or equitable, against such premises, or the rights or interests of any or either of the parties to this action therein. If the defendants, or any or either of them, are personally liable to plaintiffs, or either of them, for any part of the expenses, &c., above mentioned, such personal liability cannot be in this suit enforced, nor can plaintiffs claim to have the same satisfied out of the proceeds of the property in question, until judgment therefor has been obtained.

The motion to amend must be denied, with \$10 costs.

ARMSTRONG *a.* FOOTE.*Brooklyn City Court; December Term, 1860.*

JURISDICTION.—PERSONAL TORT WITHOUT THE STATE.

The courts of the State of New York have jurisdiction of actions for personal torts committed upon citizens of the State of New York, outside the territorial limits of the State.

An action can be maintained in a State court for a tort committed upon one of its citizens within the limits of the Brooklyn Navy Yard.*

Motion to vacate order dismissing complaint.

This was an action to recover damages for an assault and battery and false imprisonment committed on plaintiff by defendant's orders on the 4th April, 1860. It was alleged that on the day mentioned, the plaintiff, who was employed as a laborer in the Brooklyn Navy Yard, was arrested without process by the defendant, who was the executive officer of the yard, and kept in the guard-house for about four hours, and until a warrant was procured for an assault and battery committed by him the day previous upon Lieutenant Almy, outside of the yard, in the city. On the part of the defendant, it was asserted that plaintiff made threats against Lieutenant Almy, and that he was merely detained to prevent him from executing such threats. It appears that the assault and imprisonment complained of in this action were committed within the Brooklyn Navy Yard, and at the close of the case for the plaintiff, on motion of defendant's counsel, the court dismissed the complaint. The present motion was to vacate that order.

Henry A. Moore and *B. D. Silliman*, for defendant.—An action for a personal tort can only be sustained in the courts of the State where it was committed. (*Moloney a. Dows*, 8

* Overrules a previous decision reported in 19 *How. Pr.*, 237.

Abbotts' Pr., 316.) The ground occupied at Brooklyn as a United States Navy Yard, with the exclusive jurisdiction thereover, was ceded to the United States by the State of New York, and an action for a tort committed therein could only be sustained in the courts of the United States. The courts of the State of New York have no jurisdiction within the Navy Yard, and the principle precluding jurisdiction in criminal cases, applies in personal actions like the present. (*Moloney v. Dows*, *Supra*; 2 *Kent's Com.*, 474.)

James Troy, for the plaintiff.—The decision in the case of *Moloney v. Dows* has no application as authority here. *Moloney* and *Dows* were both resident citizens of the State of California, and the tort for which the action was brought, was committed there. They were both foreigners, therefore, as far as the courts of New York were concerned, and the tort was in a foreign State. In this case the plaintiff is a citizen of the State of New York, consequently the action is not between two foreigners for a tort committed in a foreign State. A distinction exists in point of jurisdiction between actions between foreigners for a tort committed in a foreign country, and actions for a tort upon one of our own citizens in a foreign country. In the former case, our courts may take cognizance, but the exercise of jurisdiction cannot be claimed *ex debito justiciæ*; and on principles of comity, as well as to prevent the frequent and serious injuries that would result from doing this in cases indiscriminately, they have exercised a sound discretion in entertaining jurisdiction or not, according to circumstances. (*Gardner v. Thomas*, 14 *Johns.*, 134; *Johnson v. Dalton*, 1 *Cow.*, 543.) In the latter case our courts have jurisdiction, and the exercise of that jurisdiction is not only a right, but a duty, "like the natural right of self-defence in individuals; the right of protecting its own members from outrage, is an inherent right in every organized community." This distinction was recognized in *Moloney v. Dows*, although the precise question was not before the court, and any decision of it would be at best but *obiter dicta*. The distinction is also recognized by the Constitution of the United States, for it gives jurisdiction to the courts of the United States of actions between aliens and citizens, but not of actions between aliens entirely. The reason is obvious. We are

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bound to protect our own citizens, and claim to adjudicate whenever their rights come in question. (See *Moloney v. Dows*, 8 *Abbotts' Pr.*, 316; *Const. U. S.*, art. 3, § 2.) The United States courts have no common-law jurisdiction, and cannot entertain an action for a tort committed in a Navy Yard or elsewhere, unless the action is between citizens of different States, or citizens and aliens, in which case it is the character of the litigants, and not the *locus in quo*, which gives jurisdiction. (See *Dred Scott Case*.) National ships in commission on the high seas, are, by the law of nations, considered as an integral part of the national territory, exclusively under the jurisdiction of the laws of the nation to which they belong; as is the Navy Yard. Yet in the case of *Wilson v. McKenzie*, which was an action for a tort committed in a national ship (the brig "Somers") on the high seas, it was held "that trespass may be maintained in the courts of this State against an officer of the navy for illegally assaulting and imprisoning one of his subordinates, though the act was done upon the high seas under color of naval discipline." (*Wilson v. McKenzie*, 7 *Hill*, 95.) Again, in *Moloney v. Dows*, the defendant was charged with getting up a treasonable insurrection in California, and as an officer of the Vigilance Committee, committed the assault and imprisonment complained of on the plaintiff in the course of hostilities. This was put in issue by the answer. A verdict would determine the fact. The court says: "It is the settled policy of these States to abstain from all interference with such disturbances arising within the borders of a foreign country; it would be a violation of comity, and an offence against the laws of a sister State, to allow her citizens to prosecute actions here against their fellow-citizens, for acts arising within her borders, for which she denies a remedy." No such question arises in the present case; and the principle which would confine the jurisdiction in actions of tort to the courts of the State in which it occurred, would go further if correct, and confine jurisdiction in such actions to the courts in the county where it was committed. (1 *Comst.*, 537; *Federalist*, 82; *Smith v. Bull*, 17 *Wend.*, 323.)

CULVER, J.—I am satisfied, on a full review of the evidence, exceptions, and rulings in this case, that the action can be sus-

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tained in the courts of this State, though the injury was committed in the Navy Yard. The case of *Moloney a. Dows* (8 *Abbotts' Pr.*, 316), can have no application to this action. The order dismissing the complaint must be set aside, with costs of former trial, and \$10 costs of this motion to abide event.

Order accordingly.

BROWN *a.* BUCKINGHAM.

Supreme Court, First District; Special Term, December, 1860.

PLEADING.—COUNTER-CLAIM.

In an action to recover possession of personal property delivered to defendant under a contract, defendant may set up as a counter-claim, a lien arising in his favor by virtue of the same contract. There is no reason why, in an action for the possession of personal property, all the claims of either party against the other, arising out of the transaction set forth in the complaint, may not be determined, as well as in an action technically on contract.*

But it is not enough to aver that the alleged counter-claim arose out of the transaction set forth in the complaint. The facts which show this to be so must be averred. *So held*, on demurrer.

Demurrer to complaint.

The plaintiffs stated in their complaint, that they were the owners, and entitled to the immediate possession, of three hundred and twenty-five pounds of silk, of the value of one thousand dollars, which was delivered to the defendant for the special purpose of being manufactured into sewing or fringe silk, and which had been so manufactured; and which silk the defendant illegally detained, after demand thereof; and they demanded judgment for the possession of the silk, or for one

* To the contrary is *Gottler a. Babcock* (7 *Ante*, 392, note), but compare *Lignot a. Redding* (4 *E. D. Smith*, 285); *Piser a. Stearns* (1 *Hill.*, 86); *Murden a. Priment* (1*b.*, 75); *Merrick a. Gordon* (20 *N. Y.* (6 *Smith*), 93); *Edgerton a. Page* (10 *Ante*, 119).

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thousand dollars, the value thereof, in case it cannot be delivered, and for damages and costs of the action.

The defendant, by answer, denied the plaintiffs' alleged right to the possession of the silk, and claimed to have a lien thereon for the sum of five hundred and sixty-eight dollars and fifty-one cents; and also, by way of counter-claim, alleged that in February, 1860, he sold and delivered to the plaintiffs certain silk, for which there remained due to him the sum of four hundred dollars; and averred that such sale and delivery arose out of the contract and transaction set forth in the complaint, as the foundation of the plaintiffs' claim, and was connected with the subject of this action.

The plaintiffs demurred to the matter stated in the answer by way of counter-claim, as not containing facts sufficient to constitute a counter-claim.

Bliss & Barlow, for plaintiffs.

H. & C. S. Andrews, for defendant.

BONNEY, J.—The first point made by the plaintiffs, on their demurrer, is that a counter-claim cannot be pleaded in an action for the possession of personal property.

The Code, in general terms, and without limitation as to the nature of the action, provides (§§ 149, 150) that the answer may contain a statement of any new matter constituting a counter-claim, which is a cause of action, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiffs' claim, or connected with the subject of the action. This language is sufficiently comprehensive to include the present case, and permits the pleading of a counter-claim in this action; and although the action of replevin, or for the possession of personal property, as it is now named, is considered as founded upon tort, I can see no good reason for holding that all claims of either of the parties against the other, arising out of the transaction set forth in the complaint, and made the foundation of the plaintiffs' claim therein, cannot be adjusted and determined in one suit of this form of action, as well as in an action properly and technically on contract. And such I understand to be the effect of the decisions of this subject.

But the plaintiffs insist that this answer does not state facts

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which show that the alleged counter-claim arises out of the transaction set forth in the complaint; and this point, in my opinion, is well taken. The answer does not state that the silk, sold by defendant to plaintiffs, was the same silk of which plaintiffs now seek to recover the possession; or that it was sold or delivered under any contract which included or applied to the silk demanded by plaintiffs; nor set forth any facts connecting in any way the transaction stated in the complaint, with the supposed cause of action stated in the answer. The averment is, that the sale and delivery of silk by defendant to plaintiffs, alleged in this answer, arose out of the contract and transaction set forth in the complaint. This may be so, but no physical fact, capable of being established by evidence, is stated which shows it, and the averment is of a conclusion of law. (*Van Shaick a. Winne*, 16 *Barb.*, 89; *Jones a. Phoenix Bank*, 8 *N. Y.* (4 *Seld.*), 235.)

For this reason judgment must be rendered for plaintiff on the demurrer, with leave to defendant to amend his answer in twenty days on payment of the costs to the demurrer.

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Supreme Court, Sixth District; General Term, July, 1860.

RECEIVER.—INSURANCE COMPANY.—CORPORATION.—WITHDRAWAL OF CAPITAL.

The objection that a plaintiff suing as receiver of a corporation does not show that his appointment was founded on a petition, does not apply where the receiver was appointed on consent of the corporation, in an action brought under section 40 of 2 Revised Statutes, 463.

Notes given to an insurance company, under section 5 of the general law, are absolute and payable at all events without an assessment. They are not contingent on the happening of losses.

Hence, when there are two departments in a company—one stock and one mutual—it is no defence to a note given on insurance in the mutual department, that all the losses in that department have been paid, and that the unpaid losses accrued in the other department.

A corporation cannot make a valid agreement with one who delivers to them securities to form a part of their original capital, and going to make up the amount of such capital required by law, that they will subsequently surrender

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the same for a less security, which will not meet the requirements of the law. Such an agreement is a fraud upon the law.

The surrender and cancelling of such a security, in pursuance of the agreement, does not release the liability of the one who gave it to the corporation. To allow it to have effect would be to sanction a withdrawal of capital, contrary to section 1, of art. 1, tit. 2, chap. 18, part 1, of the Revised Statutes.

Motion for judgment on verdict.

The facts of the case are stated in the opinion.

George T. Tuckerman, for the plaintiff.

Burditt & Lynes, for defendant.

BY THE COURT.*—PARKER, J.—The New York Central Insurance Company was organized in the year 1851, under the general law of 1849 (*Laws of 1849*, ch. 308), for the purpose of making insurance on dwelling-houses, &c., against loss or damage by fire, as provided in the second subdivision of the first section of the said act. Its charter provided that its business should be conducted upon the plan of mutual insurance; that its capital-stock should be at least one hundred thousand dollars, consisting of premium notes and premiums received, and such capital as by the consent of the board of directors should have been added; and that the corporation might, in their discretion, divide applications for insurance into two or more classes, according to the degree of hazard; and the premium notes should not in any such case be assessed for any loss except in the class to which they should belong.

By the fifth section of the act aforesaid, it is provided that no Mutual Insurance Company organized under the act in any county in the State other than the city and county of New York, and the county of Kings, shall commence business until agreements have been entered into for insurance, the premiums on which shall amount to one hundred thousand dollars; and the notes received therefor payable at the end of or within twelve months from date thereof, are to be considered a part of the capital-stock, and are to be deemed valid, and shall be negotiable and collectable for the purpose of paying any losses which may accrue, or otherwise.

* Present, MASON, BALOOM, CAMPBELL, and PARKER, JJ.

By section 19 of the act, it is provided that notes taken in advance of premiums, under the act, are not to be considered debts of the company, in determining whether a company is insolvent, but are to be regarded as assets of the company.

It is provided in section 11 of the act, that the comptroller of the State shall himself examine, or cause an examination to be made by three disinterested persons, specially appointed by him for that purpose, who shall certify under oath, in the case of a mutual company, that it has received, and is in the actual possession of the capital, premiums, or engagements of insurance, as the case may be, to the full extent required by section 5 of the act; which certificate, together with the charter, is declared to be the authority of the company to commence business and issue policies. The defendant, for the purpose of aiding in the formation of the company, and enabling it to commence business and issue policies, agreed for an insurance upon his property of \$1,400, and gave his premium note for the full amount of \$1,400, in advance of the issuing of a policy to him, which note was as follows, viz. :

\$1,400. For value received in policy No. 407, dated April 1st, 1851, issued by the New York Central Insurance Company, I promise to pay the said company, or their treasurer, for the time being, the sum of fourteen hundred dollars, in such portions and at such time or times as the directors may, agreeably to their charter and by-laws, require.

NATHAN R. BROWN.

Dated April 1st, 1851.

The note was actually made in February, 1851, and the date was then left blank. It was presented to the commissioners, who made the examination required by section 14, and formed in part the basis of their certificate, that the company had received, and was in actual possession of premium notes, based on applications for insurance, to the amount of \$100,000, as required by section 5 of the act.

At the time of the making of the note, it was agreed between the defendant and the general agent of the company, with whom the agreement to insure was made, that the note should not be taxed or assessed, but that when the company was organized, it should be returned, and a smaller note,—one for the usual

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amount charged for insurance in such companies,—substituted in its place. In pursuance of this agreement, the note was surrendered by the general agent to the defendant, the same or the next year, and a note for \$700 substituted for it, which also was subsequently taken up. The general agent testified, in relation to such substitution, and the subsequent settlement of the smaller note, as follows: "The amount of the small note was much larger than the usual notes given for insurance on that kind of property; the company did not wish to reduce the amount of their capital-stock below \$100,000. The new or small note was not strictly in conformity with the agreement made at the time the large note was given. I do not know whether \$700 was the amount assessed by the company or not. I returned the note to the defendant by the general understanding of the officers and directors of the company. The small note was received and accepted by the company in the place of the large note for \$1,400. I annexed the smaller note to the application myself. The small note was annexed to the application by the direction of the president and secretary of the company. I was present when the defendant paid money to the company on the 4th of July, 1855, before the company became insolvent. The defendant paid \$230, in four or five cases,—N. R. Brown, Rufus Brown, H. A. Brown, A. E. Arnold, and H. B. Tracy. The money paid was for the purpose of taking up the reduced notes of those persons, and in full satisfaction of said notes. The understanding was, as I understood it, between defendant and the secretary of the company, that it was a full settlement and satisfaction of the small notes, or the liability of the members thereon; this was after the expiration of the policies. There was no formal action taken by the company in relation to these small notes, but the settlement of them was fully understood and authorized by the officers and directors of the company, and the money received by the company. I tore off the large notes and took smaller ones; when the smaller notes were paid no estimate of loss was made." This is all the evidence which the case shows on that subject, except the following instrument in writing, dated October 25, 1851, signed by defendant and several others.

"We the undersigned, being desirous of promoting the permanent success and continued usefulness of the New York Cen-

tral Insurance Company, do severally agree that the premium notes heretofore given to said company by us respectively, shall continue to be held by the treasurer of said company, and liable to be assessed when necessary, according to the rules and practice of mutual insurance companies, for the payment of which assessment we will be severally, but not jointly, accountable, without recourse to any other person, to remain during the continuance of the policies on which said note or notes were given."

In the year 1856 the company was proceeded against in this court as an insolvent corporation, in an action brought against it by Horatio J. Olcott, president of the Central Bank at Cherry Valley, who held a judgment against it, obtained upon loans of money made to it from May 30, 1852, to March 24, 1853 (said Olcott being also a director of said company), and was, on the 6th day of February, 1856, adjudged to be insolvent, and its property sequestered for the payment of its debts; and the plaintiff in this action was, on the same day, appointed receiver of its property and effects, with all the powers and obligations given and imposed by article 3, title 4, of chap. 8, part 3, of the Revised Statutes, and shortly afterwards filed the requisite security, and entered upon the duties of his office as such receiver. The plaintiff, after entering upon the duties of his office, proceeded to ascertain the liabilities of the company, and to assess notes and evidences of debt held by it. He testified, on the trial, that the liabilities of the company amounted to about \$30,000, and the assessments to \$40,000, he allowing \$10,000 for bad debts and expenses of collection;—that the whole amount of notes and evidences of debt upon which the assessment was made was from \$115,000 to \$120,000; that he assessed \$532, to be paid on defendant's note of \$1,400, and on the 9th of July, 1856, demanded payment thereof personally of defendant; and he having omitted to pay the same for thirty days thereafter, pursuant to the by-laws, this suit was commenced on the 18th day of August, 1856.

The defendant insists, in the first place, that the plaintiff cannot maintain the action, because he was not duly appointed receiver, and cites *Bangs v. McIntosh* (23 *Barb.*, 591). This case does not come within Judge Smith's opinion in that case; for here the judgment of the court appointing the receiver does

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not rest upon the petition provided for in section 36 (2 *Rev. Stat.*, 463, 1 ed.); but an action was brought under section 40, the corporation was served with the summons and complaint, appeared in the action, and consented, in writing, to the judgment by which the plaintiff was appointed receiver. There can be no doubt of his due appointment.

The note in question, when made, became a portion of the original stock of the company, and was absolute and payable at all events without an assessment. This I consider settled by the decision of the Court of Appeals in *White, receiver, &c. a. Haight* (16 *N. Y.* 310, 321). Judge Denio, in giving the opinion of the court in that case, after saying that the note given, pursuant to section 5 of the act of 1849 (and in its terms entirely similar to the one in this case), was absolute and payable at all events, proceeds as follows: "The language of section 5 does not admit of any other interpretation. It seems to me to be chosen with a view to distinguish the notes to be given, from such as should operate merely as guaranties, and require an assessment. They are to be given for premiums, in advance, upon risks contracted to be taken. They are to be considered as capital. They are to be valid, that is, operative of themselves, and not on account of the happening of another event, such as the occurrence of losses. They are to be negotiable, and may therefore be indorsed and transferred by the corporation at its pleasure. And they are to be collectable, and may be sued for and recovered when they have matured. They may, moreover, be transferred or collected not only to pay losses, but otherwise, that is, to obtain money for any other lawful purpose. This language cannot, in my opinion, be otherwise understood than as describing ordinary promissory notes, available for the purposes for which such notes are usually available."

This view of the character of the note disposes of all questions arising in the case respecting the assessment, and justifies the exclusion, on the trial, of all evidence to sustain the third defence set up by the defendant, to wit: that there were two departments, a stock and a mutual department, which were entirely separate, and the one in no way liable for the debts or liabilities of the other; that defendant was insured in the mutual department; and that the losses in that department had been

fully paid by the cash premiums and receipts in that department; and that the liabilities unpaid accrued in the stock department. All this was entirely immaterial, if the note was payable absolutely, at all events, without any assessment. The corporation having been declared insolvent and a receiver appointed, he was entitled to collect the note for the payment of its debts.

The question in the case remaining to be considered is, whether the company was authorized to give up and cancel the note.

It is claimed by the defendant that the arrangement made with King, the general agent, when the note was given, not only authorized the company to surrender the note, but required of them that it should be surrendered and the smaller note taken, after the company became organized. This agreement between the defendant and King I regard as wholly invalid and void. The note being made and taken to aid in the organization of the company, and to enable it to commence business by the issuing of policies, became thereby devoted as a part of the capital-stock of the company, to secure the payment of losses and debts of the company which should accrue during its entire existence. To allow such an arrangement as was made respecting it to be carried out, would operate as a fraud upon those who should become insured by the company, and upon its creditors; and not only so, but a fraud upon the act under which the company was organized. Such an agreement would be clearly illegal, and the carrying of it out by the officers of the company a plain breach of duty on their part. The Legislature in carefully providing as they have done, by the fifth section of the act, that no mutual insurance company shall commence business until agreements have been entered into for insurance, the premiums on which shall amount to one hundred thousand dollars, secured by notes received therefor, of course intended that such notes should be real, and not sham notes, such as this is claimed to be; and a proper construction and enforcement of the act must prevent any such evasion of its intent as is here attempted. In the case of *Brouwer, receiver, &c. v. Appleby* (1 *Sandf. S. C.*, 158), the Superior Court held, in respect to a note given under section 12 of the charter of the Atlantic Mutual Insurance Company, which is similar, in this respect,

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to the aforesaid section 5, that the president of the company had no power to make an agreement to give it up at the end of twelve months, which it had to run, and Judge Oakley remarks, that "it is doubtful whether the board of directors could have made such an agreement without a valuable consideration, and in *Brouwer, receiver, &c. v. Hill* (1 *Sandf. S. C.*, 629), the same court expressly held that the board of directors had no such power. The defendant's counsel relies upon the case of the *Bank of Lyons v. Demmon* (*Lalor's Sup. to Hill & D.*, 398), as authority to show that the note might be and was properly surrendered. In that case the defendant gave his note for \$1,000 to the bank for ten shares of its capital-stock, of \$100 each, with the understanding that he could return the stock and take up his note whenever he desired to do so. And it was held that the understanding having been carried out, and the stock received back by the bank, the receiver of the bank could not maintain an action on the note.

The note in that case was very differently circumstanced from the one in the case at bar; it formed no part of the capital-stock of the bank, and, in the language of the court, the giving of it up upon such an arrangement was not "a fraud upon the stockholders or the public, or a violation of any principle of the common or statute law." In this case, as before shown, the note formed a part of the original capital-stock of the company, expressly made so by the fifth section of the act of 1849, under which the company was organized; and the remark above quoted from the opinion of the court in that case certainly cannot be applied to this; for the surrender of the note in this case was both a fraud upon the insurers in the company and the public, and a violation of an express statutory provision. The act of 1849 subjects all companies formed under it to all the provisions of the Revised Statutes in relation to corporations, so far as the same are applicable; under art. 1, title 2, of chap. 18, of the first part of the Revised Statutes, the directors of moneyed corporations are prohibited from doing the very thing which was done in this case. The first section of that article provides as follows:

§ 1. It shall not be lawful for the directors of any moneyed corporation, 1. To make dividends, &c.

2. To divide, *withdraw*, or in *any manner pay* to the stock-

holders, or any of them, any part of the capital-stock of the corporation, or to *reduce* such capital-stock without the consent of the Legislature."

And by the third article of that title it is provided that the term "moneyed corporation," as used in the title, "shall be construed to mean every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to *make insurances*." The surrender of the note was *withdrawing* so much as it represented of the capital-stock of the company, which could not legally be done. The note, therefore, could not be given up and cancelled without an equivalent. This prohibition is absolute, not conditioned that the corporation shall be left solvent, or with a specific amount of capital. It matters not, then, whether the company was solvent when the note was cancelled, nor whether it had remaining a capital of \$100,000. Those who insured in the company after it commenced business, and gave their premium notes, had a right to look to the original capital with which it started for their security; and to allow that original capital to be withdrawn, even if a like amount should have been received and accumulated, in subsequent premium notes, would be a fraud on the makers of such subsequent notes, and would be, at all events, equally within the prohibition of the statute.

If I am correct in the above conclusions, it follows that the defendant was not released from his obligation to pay the note by its illegal surrender; and that the receiver may maintain an action upon it. (See 3 *Seld.*, 328, 346; 1 *Sandf. S. C.*, 629.) There was no legal defence made to the note, and the court was right in refusing to nonsuit, and in directing a verdict for the plaintiff.

Judgment should therefore be given for the plaintiff on the verdict.

BALCOM, J., dissented.

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DEVLIN *a.* PLATT.*New York Common Pleas; At Chambers, January, 1861.*

CERTIORARI.—NEW YORK COMMON PLEAS.—POWER OF ASSOCIATE JUDGE.—ACTING MAYOR.—MAYOR'S POWER TO REMOVE OFFICERS.—DELIVERY OF BOOKS, ETC.

The Supreme Court have not power by certiorari to arrest a special proceeding,—*e. g.*, proceedings to compel delivery of official books and papers, under 1 Rev. Stat., 124, §§ 50–53,—instituted before a judge of another court sitting at chambers, prior to any final determination being made of the matter involved.

The legitimate office of the common-law certiorari is to review and correct decisions and final determinations, not to divest the inferior jurisdiction of the right of terminating the proceedings, nor to withdraw from it the question to be tried.

Under the present enlarged jurisdiction of the New York Common Pleas and its judges, the provision of Laws of 1844, 80, ch. 32,—declaring that no habeas corpus or certiorari shall be allowed, removing a proceeding before judgment or final decision, from the Court of Common Pleas,—applies not only to proceedings in the court, but also to all such proceedings as by statute are authorized to be instituted before any judge of the court.

Upon these principles, a certiorari addressed to a judge of the Common Pleas to remove proceedings to compel the delivery of books and papers belonging to a public office, before such proceedings have been brought to a determination, may be disregarded as a nullity by the judge to whom it is addressed.

Under the various provisions of law relating to the New York Common Pleas, an associate judge of that court possesses the power conferred by the Revised Statutes upon the first judge of the county in respect to those proceedings.

Under the charter of the city of New York, as amended 1857 (1 *Laws of 1857*, 874), in the absence of the mayor from the city, the president of the Board of Aldermen becomes mayor in fact for every purpose, and can exercise all his powers, including the appointment and removal of officers.

The mayor has no power to *suspend* the chamberlain. The latter officer is only the chief of a bureau, and it is only heads of departments that he may suspend.

Motion for an order for the delivery of the books and papers pertaining to the office of chamberlain of the city of New York.

In December, 1860, during the absence of the mayor of the city of New York, from the city, the president of the Board of Aldermen, by virtue of his power as acting mayor, and with

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the concurrence of the Board of Aldermen, removed Platt from his office of city chamberlain; and with the consent of the Board of Aldermen appointed Devlin in his stead. The mayor on his return made an order suspending Devlin, and Platt accordingly refusing to deliver over the books and papers of the office, Devlin obtained an order, under the provisions of the Revised Statutes, requiring him to show cause why he should not deliver them.

When the application came on to be heard before Judge Hilton, the counsel for Platt served upon the judge a writ of certiorari, which had been allowed by a justice of the Supreme Court, requiring the removal of the proceedings into that court.

John E. Devlin and Greene C. Bronson, for the motion.

Edgar S. Van Winkle and James R. Whiting, opposed.

HILTON, J.—This proceeding has been instituted before me under 1 Revised Statutes, 124, §§ 50, 51, 52, 53, on behalf of Daniel Devlin, claiming to have been duly appointed successor of Nathan C. Platt, as chamberlain of the city of New York, to procure the delivery of the books and papers appertaining to the office, and which are in his custody.

The sections of the statutes referred to, provide: That whenever a person shall be removed from public office, or his term shall expire, he shall, on demand, deliver over to his successor all the books and papers in his custody in any way appertaining to the office; and in case of neglect or refusal so to do, such successor may make application to any justice of the Supreme Court, or first judge of the county where the person so refusing shall reside; who, upon being satisfied by proper proof that any such books or papers are withheld, shall grant an order directing such person to show cause, within a short and reasonable time, why he should not be compelled to deliver the same. At the time appointed the officer must proceed to inquire into the circumstances, when, if the person charged shall make oath that he has truly delivered over to his successor all such books and papers, further proceedings shall thereupon cease. But, if such oath is not made, and it appears that the books and papers are withheld, the judge before whom the proceedings are had, shall,

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by warrant, commit the person so withholding to the jail of the county, there to remain until he delivers over such books and papers, or is otherwise discharged according to law.

Having, upon sufficient proof, granted the order to show cause; at the time appointed the parties appeared, and the counsel for Mr. Platt produced a writ of certiorari issued by the Supreme Court in this district, granted at a special term thereof, held by Mr. Justice Barnard, and claimed that by virtue of the writ all my powers were suspended and stayed, and this proceeding was removed into the Supreme Court.

My answer to this was, that although entertaining great respect for the tribunal from which the writ emanated, yet I did not consider it as possessing the power to arrest a proceeding thus instituted before me as a judge of the Court of Common Pleas, prior to any final determination being made of the matters involved. That if the writ had the effect claimed, its operation would be to remove a statutory proceeding, intended to be summary, before a judge sitting at chambers, into the Supreme Court at a general term—a tribunal possessing no power whatever to continue or complete it, or to give any relief to the application thus removed in its incipient state.

On reflection, I see no reason to change the views thus expressed. There cannot of course be a doubt as to the power of the Supreme Court to review, by means of the common-law writ of certiorari, the final adjudications and determinations of all officers vested by the Legislature with power to decide upon the property or rights of any citizen, and who act in a summary manner, in a course different from that at common law. But, as the legitimate office of the writ is to enable the court to review and correct the decisions and final determinations of inferior officers and tribunals, and not to invest the court with the right to exercise the powers thus conferred by statute on special officers and tribunals, it necessarily follows, that the writ cannot, before trial and final determination, divest the inferior jurisdiction of the right to terminate the proceeding instituted before it, nor does it withdraw from it the question to be tried. As was said in *Lynde v. Noble* (20 *Johns.*, 80, 83), "When this certiorari was granted, there had been no order, judgment, or trial; the magistrate had performed a ministerial act only; he had administered an oath and issued

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a summons. By allowing a certiorari the superior tribunal would be assuming an original jurisdiction instead of a power to review and correct;" and in that case, *WOODWORTH, J.*, in delivering the opinion of the court, remarked: "I have not met with any case where, in a civil proceeding before an inferior magistrate who has express jurisdiction by statute, a certiorari has been held to lie to remove the issue or question to be tried by the magistrate, to the Supreme Court;" and, indeed, he might have added, that according to the whole current of authorities from the earliest times to the present, the common-law writ of certiorari never lies before judgment. Thus, it is stated in *Bacon's Abr.* (tit., *Certiorari*, 560), that it is a good objection against granting the writ, that issue is joined and venire awarded for trial in the court below. In *Rex a. Nicholls* (2 *Strange*, 1227), it was held that a verdict could not be removed by certiorari, from the sessions, before judgment. (See also *Comyn's Dig.*, tit., *Certiorari*.) And in *Haines a. Backus* (4 *Wend.*, 213), the late Supreme Court held to this view in a case in all respects analogous to the present. There, proceedings under the statute relative to forcible entry and detainer, were instituted before a county judge, who, upon complaint made, had issued a precept to inquire into the matters in question. The parties appeared, but previous to the jury being called, a certiorari, removing the proceeding into the Supreme Court, was served upon the judge, who, thereupon, suspended proceedings and made return to the writ. On motion to quash, the court, per *SAVAGE, Ch. J.*, held, "that the certiorari was clearly premature: until inquisition found there was nothing to remove. The inquisition could not be found by the court, but could be obtained only in the method prescribed by the statute." (See 2 *Rev. Stat.*, 510.)

Many other cases might be cited, but it seems unnecessary. They all tend, however, to recognize the writ as performing the same office to inferior tribunals or jurisdictions, that a writ of error formerly did to inferior courts of record, and that in its office of removing final adjudications for review, it possesses all the characteristics of a writ of error. (*Stone a. Mayor of New York*, 25 *Wend.*, 517; *Morewood a. Hollister*, *PRATT, J.*, 2 *Seld.*, 309, 312; *Birdsall a. Phillips*, 17 *Wend.*, 463, 468, and cases cited.)

But a conclusive answer to the right claimed by the Supreme

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Court, in respect to this proceeding, is to be found in the Laws of 1844, 30, ch. 32, which declares that no writ of habeas corpus or certiorari shall be allowed, whereby any cause or proceeding may be removed before a final judgment in such cause, or before a final decision in such proceeding, from the Court of Common Pleas into the Supreme Court,—except, that transitory actions may be removed, where a trial ought to be had elsewhere than in the city of New York. This statute, however, as I have already shown, was only declaratory of the existing law, but was evidently intended to place the question beyond dispute.

On the argument, counsel for Mr. Platt insisted that it related only to proceedings in court; but when it is borne in mind that at the time this law was enacted, the Court of Common Pleas existed only as a court of common-law jurisdiction, possessing no equity powers whatever, and therefore no right to entertain any special proceeding as a court, while on the other hand the judges were invested with almost innumerable powers in special statutory proceedings, it follows, I think, as an irresistible conclusion, that the law, to have any effect whatever, must have the interpretation that it relates to all such proceedings as by statute were authorized to be instituted before any judge of the Common Pleas. (See, also, 2 *Rev. Stat.*, 389, §§ 2, 14, 16.)

Believing, for the reasons stated, that the writ thus served upon me,—and which it seems was procured *ex parte*, and upon that ground irregular (see *Munro v. Baker*, 6 *Cow.*, 396), and might be treated as a nullity (*Shotwell v. Daniels*, 8 *Johns.*, 341; *Graham's Prac.*, 559),—was not only improvidently issued, but unauthorized by law, I concluded to disregard it, and directed the proceeding before me to continue; whereupon it was further contended on behalf of Mr. Platt, that as I was not the first judge of the Court of Common Pleas, or of the county, I was not possessed of any power or jurisdiction in the premises. This objection it is proper to say, was not accompanied by a reference to any statutes bearing upon the point; therefore, for the information of the counsel, I will briefly refer to the authorities under which each judge of the court is invested with all the powers of the first judge of the county, and can act as such in any statutory proceeding which may be instituted before such an officer.

I believe it will be conceded that the present Court of Common Pleas may date its origin far beyond that of any judicial tribunal in this State. Beginning under the rule of Governor Stuyvesant, in 1653, it was known as the Court of Burgomasters and Schepens (see History of the Court, by Judge Daly, 1 *E. D. Smith*, 24); with several changes, more particularly respecting its jurisdiction, it continued until the Dutch formally surrendered the colony of New Netherlands to the English, when, in 1674, it was convened as the Mayor's Court; and thus, though not without many alterations in its powers, &c., it remained down to 1821 (see *Laws*, 64), when it was changed to that of "the Court of Common Pleas, or County Court of the city and county of New York," and a first judge was authorized to be appointed to preside in it. In 1834 an associate judge was added (see *Laws*, 118, ch. 94), and in 1839 (see *Laws*, ch. 116), another; each possessing, however, all the powers and jurisdictions of the first judge, in any suit or proceeding. The Constitution of 1846 (art. 6), in reorganizing the judicial power of the State, did not interfere with the court as thus constituted, but on the contrary, by art. 14, sec. 12, expressly declared that it should remain with its then powers and jurisdictions, until otherwise directed by the Legislature, and the judges thereof should continue in office until the expiration of their terms, or until the Legislature should otherwise direct. In 1847 (see *Laws*, 279) the Legislature provided for the election of three judges of the court, who were to select one of their number to be the first judge, and declared that the judges so elected should have and possess the same powers and perform the same duties that the first and assistant judges then possessed, had, and performed. Language so plain as this would not seem to need a judicial interpretation, yet it was construed by the Court of Appeals, in *Renard v. Hargous* (3 *Kern.*, 259), to continue in the present judges, not only all the powers and jurisdictions formerly possessed by the Court of Common Pleas, or County Court, or by the first and associate judges thereof, but also the power of Supreme Court Commissioner, which the judges theretofore possessed *virtute officio*.

This would seem, as it doubtless is, sufficient to justify me in entertaining jurisdiction of the present proceeding; but I may go still further. By the Judiciary Act of 1847 (see *Laws*,

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330, § 36), the County Courts in the several counties of this State, except in this city, were organized with all the powers of the former Courts of Common Pleas, and the county judge was invested with all the powers and duties and jurisdiction of the former judges of such courts. The Code of Procedure, in 1848, somewhat limited these powers of the County Court, but continued them respecting all statutory proceedings like the present. Then,—and as it would seem, further to place the powers and jurisdiction of this court and its judges beyond a doubt,—in 1854 (see *Laws*, 464, ch. 198), a law was passed, declaring that the present Court of Common Pleas had power and jurisdiction to exercise in this city and county all the powers and jurisdictions then, or thereafter to be, conferred upon or vested in the County Courts in their counties, and also the power and jurisdiction which were vested in the Court of Common Pleas prior to the enactment of the Code of Procedure in 1848; all this being in addition to the powers conferred upon us by the Code (§ 33), creating us a court of general jurisdiction in all actions and proceedings, whether at law or in equity, within the county of New York.

Having for these reasons determined that I possessed the power conferred by the statute upon the first judge of the county, in respect to proceedings of this nature, I directed the present controversy to proceed before me. Counsel for Mr. Platt then presented his affidavit, denying that he had been legally removed from the office of chamberlain, or that Mr. Devlin had been legally appointed his successor. In opposition to this, a record of the proceedings of the Board of Aldermen upon the removal of Mr. Platt was produced, duly certified by the clerk of the Common Council (see *Laws of* 1832, 251, ch. 158, § 3), showing, that during the year 1860, Alderman William J. Peck was the president of the Board of Aldermen; that on December 24th, Mr. Peck, being then acting mayor of the city, removed Mr. Platt from the office of chamberlain, for certain causes alleged, and asked the board, to whom he addressed a written communication on the subject, to concur in such removal. It appears that the Board of Aldermen concurred, and thereupon a message was received from the acting mayor, Mr. Peck, nominating Daniel Devlin to such office, and the board consented thereto. It was further shown to my satisfaction, that, on the 21st day of December, 1860, Hon. Fernando

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Wood, the elected mayor, left the City and State of New York, and did not return till the 27th of the month; during all which time Mr. Peck attended to the mayor's office, and acted as the mayor of the city; and that during the time he so acted, Mr. Wood was not present at the office.

Opposed to the appointment thus made, Mr. Platt alleges that the mayor has suspended Mr. Devlin from the office of chamberlain.

Assuming that the proof and claim on behalf of Mr. Devlin is sufficiently denied by Mr. Platt, it becomes necessary for me to look into the charter of the city for the purpose of determining whether the removal and appointment thus made is in conformity with its provisions. (*Laws of 1857, 874, § 1.*) By section 17, it is declared that whenever there shall be a vacancy in the office of mayor, or whenever the mayor shall be absent from the city, or be prevented by sickness or any other cause from attending to the duties of his office, or shall be removed, as in the charter provided, the president of the Board of Aldermen shall act as mayor, and shall possess all the rights and powers of the mayor during the continuance of such vacancy, absence, or disability.

Section 22 provides for a department in the city government, denominated the Department of Finance, the chief officer of which shall be called the comptroller of the city of New York. In this department there shall be a bureau for the reception and paying out of moneys belonging to the city, the chief officer of which bureau is called the chamberlain of the city of New York, who is required to keep certain books of account. This officer, by section 21, is to be appointed by the mayor, with the consent of the Board of Aldermen, and may be removed in the same manner with the heads of departments.

The power of removal is, by the same section, given in these words: "The mayor shall have power to suspend, for cause, during any recess of the Common Council, and by and with the consent of the Board of Aldermen to remove, any of the heads of departments, except the comptroller and the counsel to the Corporation; which suspension, and the cause thereof, shall be communicated to the Common Council, if in session, and if not, then at the first meeting thereof. The Board of Aldermen shall have power, without the consent of the mayor, by a vote of two-

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thirds of all the members elected, to remove any of the heads of department for cause, other than the comptroller and the counsel to the Corporation."

It seems to me that provisions so plain and unambiguous require no comment or explanation. In the absence of the mayor the president of the Board of Aldermen becomes mayor in fact for every purpose, and can exercise all his powers. He may, with the consent of the Board of Aldermen, remove the chamberlain and appoint another in his place; but as this officer is only chief of a bureau in a department of which the comptroller is head, there is no power of suspension connected with him, that power being confined to the heads of departments.

The conclusion is thus forced upon my mind, unaccompanied by any doubt whatever, that, under the circumstances disclosed, Mr. Platt has been legally removed from the office of chamberlain, and Mr. Devlin has been duly appointed his successor, and as such, is entitled to have delivered to his custody all the books and papers in the possession of Mr. Platt appertaining to the office. (The People *v.* Stevens, 5 *Hill*, 616, 626.) I must therefore declare that it has been made to appear to me that such books and papers are withheld by Mr. Platt from Mr. Devlin; and under the provisions of the statutes respecting proceedings of this nature (§ 53), I am constrained to issue a warrant committing Mr. Platt to the county jail, there to remain until he shall deliver up such books and papers, or be otherwise discharged according to law.

MATTER OF COLLINS.

New York Oyer and Terminer; December, 1860.

CRIMINAL LAW.—INQUEST.—COMMITMENT.

It is not necessary that a coroner on holding an inquisition on the body of a person dead or wounded, should take the testimony of the witnesses in the presence of the accused.

The accused, when brought before the coroner upon his process issued after an

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inquisition, has no right to require the examination of witnesses to establish his guilt or innocence. The process for the apprehension of the accused when not in custody, and the mittimus for sending him to prison, are based solely upon the inquisition. The coroner has no power to take testimony to establish the innocence of the prisoner, and then discharge him contrary to the finding of the jury.

A commitment issued by a coroner against a person charged with murder, is not void for the omission of the allegation that he caused the death "feloniously," if it is such that the fact that he caused the death feloniously may be collected on its face.

Habeas corpus and certiorari to inquire into the detention of Philip Collins.

The prisoner was confined in the City Prison of the city of New York. The warden of the prison brought him into court in obedience to the command of the habeas corpus; and returned that he held and detained the prisoner by virtue of a commitment (setting forth a copy of it), issued by William Schirmer, coroner of the said city, dated December 11, 1860. The commitment recited that Collins was charged before the coroner, on the finding of a coroner's jury, with having on December 8, 1860, at the city of New York, caused the death of Henry Binatus, by striking him on the head with a club. The proceedings before the coroner were brought up by certiorari. It appeared that the coroner summoned a jury according to law, and examined witnesses before them, whose evidence tended to show that the prisoner was guilty of murdering the deceased. The jury inspected the body of the deceased, and delivered to the coroner their inquisition in writing, signed by them, in which they certified and found, that the deceased came to his death by compression of the brain, "the result of a blow of a club, or some blunt instrument, in the hands of the prisoner." It did not appear that the coroner issued any process for the apprehension of the prisoner, but it did appear that he was in the custody of the coroner. The following certificate was among the papers brought up by the certiorari:

CORONER'S OFFICE,
City and County of New York, } ss.

Philip Collins being duly examined before the undersigned, according to law, on the annexed charge, and being

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informed that he was at liberty to answer or not, all or any questions put to him, stated as follows, viz. :

Q. What is your name?

A. Philip Collins.

Q. How old are you?

A. Forty-four years.

Q. Where were you born?

A. Ireland.

Q. Where do you live?

A. No. 11 Albany-street.

Q. What is your occupation?

A. I keep a liquor and grocery store.

Q. Have you any thing to say, and if so what, relative to the charge here preferred against you?

A. I am innocent in every respect.

his
PHILIP ✚ COLLINS.
mark.

Taken December 11, 1860.

WILLIAM SCHIRMER, Coroner.

The commitment or mittimus was in the following form :

City and County of New York, ss.

By William Schirmer, Esq., one of the coroners in and for the city and county of New York, to the constables and policemen of the said city, and every of them, and to the warden of the City Prison of the said city.

These are, in the name of the People of the State of New York, to command you, the said constables and policemen, and every of you, to convey to the said prison, the body of Philip Collins, and deliver it to the warden thereof; and you, the said warden, are hereby commanded to receive into your custody, in the said prison, the body of the said Philip Collins, who stands charged before me, on the finding of a coroner's jury, with having, on the eighth day of December, 1860, at the city of New York, in the county of New York, caused the death of Henry Binatus, by striking him on the head with a club; and that you safely keep the said Philip Collins in your custody, in the said prison, until he shall find surety in the

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sum of hundred dollars to answer said complaint,
or be thence delivered by due course of law.

Given, &c.

The prisoner asked to be discharged from imprisonment on the ground that the commitment was defective, and that no witnesses were examined against him before the coroner after the finding of the inquisition by the jury, so he could cross-examine them, and because he had no opportunity to produce witnesses on his part; and if the court should refuse to discharge him, he asked that the case be investigated before the Oyer and Terminer, or some officer to be designated by the court, and that the People's witnesses be produced and examined on oath against him, in his presence, and that he be permitted to cross-examine them, and produce witnesses on his part to show his innocence; and should this request be denied him, he asked to be let to bail, and insisted that the evidence taken before the coroner's jury did not show that he was guilty of any crime, unless it were manslaughter in the fourth degree.

Charles S. Spencer and *James M. Smith*, for the prisoner.

John H. Anthon, assistant district-attorney, for the people.

BALCOLM, J.—A coroner's jury upon the inspection of the body of the person dead or wounded, and after hearing the testimony, must find and certify in their inquisition how, and in what manner, and when and where, the person so dead or wounded, came to his death, or was wounded, as the case may be, and who such person was; and all the circumstances attending such death or wounding, and who were guilty thereof; either as principal or accessory, and in what manner. (3 *Rev. Stat.*, 5 ed., 1036, § 5.) If the jury find that any murder, manslaughter, or assault has been committed, the coroner is required to bind over the witnesses to appear and testify at the next criminal court at which an indictment for such offence can be found, that shall be held in the county, and if the party charged with any such offence be not in custody, the coroner has power to issue process for his apprehension in the same manner as justices of the peace. (*Ib.*, 1037, § 6.) The coroner issuing

such process shall have the same power to examine *the defendant* as is possessed by a justice of the peace, and shall in all respects proceed in like manner. (*Ib.*, § 7.) There is no statute that directs the coroner to take the testimony of the witnesses in the presence of the party accused, who are examined before the jury; or that requires him to examine any witnesses to establish the guilt of such party when brought before him by virtue of process issued after the finding of the inquisition; or that permits such party to produce witnesses before the coroner to show himself innocent of the crime charged upon him. It is, however, the duty of the coroner to present before the jury all the material testimony within his power, touching the death or wounding, as to the manner whereof the jury are to certify, and that which makes for, as well as against, the party accused. (See *Hale's Pleas of the Crown*, Phila. ed., 1847, with notes by Stokes and Ingersoll, vol. i., p. 415; vol. ii., pp. 60, 61.)

I think the coroner issues process "in the same manner as justices of the peace," when it is directed to the same officers, signed by him, returnable before him, and in the same form that the process of such justices is in like cases; and when he examines the defendant, he "proceeds in all respects in like manner as a justice of the peace," if he conducts the examination in the same way as a justice takes examination in similar cases. When he has done these things, his whole duty is performed so far as it relates to the apprehension of the accused and his examination in regard to the offence charged. The coroner is only required to return to the next criminal court of record, that shall be held in the county, the testimony of all witnesses examined before the jury, together with the inquisition of the jury, and all recognizances and examinations taken by him. (3 *Rev. Stat.*, 5 ed., 1037, § 8.) He is not directed to return any testimony taken before him subsequent to the finding of the inquisition, for the reason that there is no law requiring him to take any.

When a person is brought before a justice of the peace upon criminal process, the justice must examine the complainant and the witnesses produced in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offence charged. (3 *Rev. Stat.*, 5 ed., 995, § 13.) And after the examination of the prisoner is completed, in the manner prescribed by statute, his witnesses, if he have any, shall be sworn and examined, and he

may have the assistance of counsel in such examination. (*Ib.*, § 17.) The examination of the prisoner before the justice is a very different thing from the examination of the witnesses there, either against him or in his behalf. Specific provisions are made for doing both; but as I read the statutes defining the duties of the coroner, he can only examine *the prisoner* in the same manner that a justice of the peace would in a like case, and is not authorized to examine witnesses either against the prisoner or for him, when he is apprehended by virtue of process issued subsequent to the finding of the inquisition by the jury, or is in custody of the coroner without process at the time the same is found. He issues his process for the apprehension of the accused, when not in custody, solely upon the inquisition, and also his mittimus for sending him to prison to await the action of the grand jury. (1 *Chitty's Cr. L.*, 164; *Hale's Pleas of the Crown*, vol. ii., p. 63.) He has no power to take testimony to establish the innocence of the prisoner and then discharge him, contrary to the finding of his jury. I think the inquisition, though taken in the absence of the prisoner, and upon the testimony of witnesses he could not cross-examine, settles the question of his guilt (at least so far as it concerns the coroner) until the grand jury passes upon the case. It justifies the commitment of the prisoner to jail, in the same manner that the testimony of witnesses does, taken before a justice of the peace. (1 *Chitty's Cr. L.*, 164.) He has the privilege of telling his own story before the coroner, which is to be returned with the inquisition, and that is all. He cannot be discharged on it, however plausible it may be; and the Legislature has not secured him the privilege of proving it true before the coroner or grand jury. It seems to me that if the Legislature had intended that the prisoner should be confronted with the People's witnesses before the coroner, or that he should have the privilege of there producing witnesses in his own behalf, they would have so declared in unequivocal language. For such proceedings before the coroner are not recognized by the common law.

In England "a defendant may be prosecuted for murder by coroners' inquests, *super visum corporis*. The finding of such inquests [there] is equivalent to the finding of a grand jury, and a woman tried on a coroner's inquest, for the murder of her

bastard child, may be found guilty under 43 Geo. III., ch. 58, § 4, of endeavoring to conceal its birth; there being no distinction in this respect between the coroner's inquisition and a bill of indictment returned by the grand jury." (1 *Chitty's Cr. Law*, 157, 162, 164.) And "in cases of murder or manslaughter, where, besides the indictment, there is also a coroner's inquisition, it is usual to arraign the prisoner on the inquisition immediately after arraigning him on the indictment, and to try him on both at the same time." (*Archbold's Cr. Pl.*, Waterman's ed., vol. i., p. 108; 1 *East's Pleas of the Crown*, Lond. ed., 1803, 371.) In this country no person can be tried upon a coroner's inquisition, yet the inquisition of a coroner's jury finding a person guilty of murder has about the same force against him until the grand jury passes upon his case, that an indictment found by them has thereafter, prior to his trial. There is, however, this difference between the effect of the two in England, and also in this country:

"The finding of a grand jury is regarded as of more weight than an inquisition taken before the coroner; as the court will, in their discretion, bail after the latter, but always refuse after the former, the reason of which may be, that in the one case they can look into the depositions to see if the evidence supports the charge of murder, whereas in the other the investigation is secret and does not admit of a summary revision." (*Ib.*, 164.) The courts possess the power to let to bail for murder, even after indictment, but they never exercise it, unless after a trial and a disagreement of the jury there appears to be great doubt of a conviction ever being obtained. The prisoner's counsel has said that it is a great hardship for a person to be imprisoned for months by reason of the inquisition of a coroner's jury, when, if permitted, he could establish his innocence before that officer; and so it is, but it is no greater hardship than it is for an innocent man, who is indicted by the grand jury for the crime of murder, to lie in jail until he can be tried in the Oyer and Terminer, when, if allowed the privilege, he could have shown his innocence by cross-examining the People's witnesses before the grand jury, or by there producing testimony in his own behalf. The answer to all this is: That the law does not confer such privileges upon a person charged with homicide, and the courts must enforce it as they find it. The proceed-

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ings in this case before the coroner, the inquisition of the jury, and the commitment of the prisoner by the coroner were regular, and the inquisition is sustained by the evidence returned therewith. This being the case, the prisoner should not be discharged or have the case investigated again before it is passed upon by the grand jury.

The mittimus is not void for the omission of the allegation that the prisoner caused the death of Binatus "feloniously," because the fact that he "feloniously" caused it, may be collected on the face thereof. (*Bar. Cr. Law*, 2d ed., 571.) But if the commitment were irregular, the prisoner could not be discharged; for the reason that the testimony taken before the coroner's jury shows that Henry Binatus came to his death in the city of New York on the eighth day of December, 1860, by compression of the brain, "the result of the blow of a club, or some blunt instrument," and that there is probable cause to charge the prisoner with unlawfully inflicting such blow. Such being the facts, it would be the duty of the court, even though the commitment were irregular, to let the prisoner to bail if the case wereailable, and good bail were offered; or if not, forthwith to remand him. (3 *Rev. Stat.*, 5 ed., 888, § 58.)

The prisoner having been legally committed to jail for the crime of murder, and it appearing there is probable cause for charging him with such offence, he should not be let to bail, but should be remanded to prison, there to await the action of the grand jury.

Decision accordingly.

READ *a. POTTER*.

Supreme Court, First District; At Chambers, October, 1860.

STAY OF PROCEEDINGS ON APPEAL.

On appeal from a judgment directing the delivery of personal property, such as will depreciate by time and use, it would not be just for the court to allow a stay of proceedings upon an undertaking to obey the order of the court upon

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the appeal, under section 336 of the Code of Procedure. The respondent should have indemnity for the use and the depreciation of the property in case the judgment is affirmed.

Motion for stay of proceedings on appeal from a judgment.

LEONARD, J.—The judgment in this case directs the delivery, &c., of personal property now in the possession of the defendants, Potter and wife, to a receiver. The property is such as will depreciate by time and use.

The defendants have appealed from the judgment, and propose to give security under section 336 of the Code, to procure a stay of proceedings, and application is now made to the court to direct the amount in which the security shall be given.

That section provides that the property shall be delivered to a receiver, &c., or the appellant shall execute an undertaking with sureties, in such amount as the court shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

The appellate court can only reverse, affirm, or modify the judgment appealed from. (§ 330.)

Should the judgment be affirmed, the result will be that the defendants will then be required, as the judgment now requires them, to deliver the property to a receiver; and if they shall then do so, the plaintiff will have no remedy on the undertaking given on the appeal; that is, there will not have been any breach of the undertaking, and of course no cause of action will have arisen.

Such a result will be to give the defendants the use of the property in the mean time, and if it has depreciated in value, plaintiff will sustain an injury without having any indemnity therefor on the undertaking.

The appellant is not to have a stay of proceedings on such an appeal, unless the court or a judge thereof so order (§ 348). The stay may be made on such terms as to security, or otherwise, as may be just, the security not to exceed the amount required on an appeal to the Court of Appeals (§ 348).

In a case like the present, it would manifestly not be just to order a stay on any undertaking under § 336.

A stay of proceedings will be refused in this case, unless an undertaking be executed in double the value of the property

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(if it is of less value than the amount of the judgment), or in double the amount of the judgment (if the property be of greater value) for the payment of a certain sum, to be fixed according to the value of the property, in case the judgment be affirmed.

EDGERTON a. FORD.

Supreme Court, First District; General Term, December, 1860.

ARREST.—CONDITION OF VACATING.

The discretion exercised by the court at general term in imposing a stipulation not to sue for false imprisonment, &c., as a condition of vacating an order of arrest, is not to be reviewed by the court below, or in another proceeding at a subsequent general term.

On appeal from an order denying defendant's motion to vacate an order for his arrest, the order was reversed on condition that he stipulate not to sue for the arrest; but if he should not, the order was affirmed;—and he did not accept the condition. *Held*, that the affirmance was conclusive on his subsequent motion to set aside an execution against his person; and the court would not review the order on the ground that such condition was oppressive.

Appeal from order refusing to set aside execution.

In this action an order of arrest was granted against the defendant, on the ground of fraud in contracting the debt for which the action was brought. He moved to set it aside, but his motion was denied at special term; and on his appeal to the general term, the order denying the motion was reversed conditionally, on the ground that by accepting a note for the debt, and suing thereon, the plaintiff had waived the right to arrest. The terms of the order of reversal were as follows: "Ordered, that the said order be, and the same is hereby reversed without costs, on the defendant stipulating in writing, to be served on the attorneys for the plaintiff within ten days after the service of a copy of this order on the attorney for the defendant, not to bring any action for malicious prosecution or false imprisonment; but should he neglect to give such stipulation within the time aforesaid, the said order is hereby affirmed."

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The defendant did not comply with this condition, and plaintiff obtained judgment, and issued execution against the person.

The defendant then moved at special term to set aside the execution, on the ground, among others, that the condition embraced in the order was illegal, unjust, and oppressive, and contrary to the statute. The motion was denied, and he appealed to the general term.

C. F. Wetmore, for the defendant.

A. F. Smith, for the respondent.

BY THE COURT.*—SUTHERLAND, P. J.—The order of the general term was perfectly conclusive upon the justice who made the order at special term appealed from. He could not do otherwise than to deny the defendant's motion to set aside the execution. That motion and this appeal from the order denying it, is but an attempt to get one general term to review the decision of another general term.

The order appealed from should be affirmed, with costs.

BONNEY, J.—The defendant moved, at special term, to set aside an execution against his person, issued upon the judgment recovered in this action. The motion was denied, and defendant has appealed. The papers show that an order of arrest was made in this action, under section 179 of the Code, upon the ground that the defendant had been guilty of fraud in contracting the debt for which the action was brought. A motion to vacate said order was denied at special term. From the order denying that motion, defendant appealed, and the court at general term ordered "that the said order be, and the same is hereby reversed without costs, on the defendant stipulating in writing, to be served on the attorneys for the plaintiffs within ten days after the service of a copy of this order on the attorney for the defendant, not to bring any action for malicious prosecution or false imprisonment; but should he neglect to give such stipulation within the time aforesaid, the said order is hereby affirmed." The stipulation was not given; but the defendant insists that the condition in the order requiring it is illegal, un-

* Present, SUTHERLAND, P. J., INGRAHAM and BONNEY, JJ.

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just, and oppressive, and in violation of the statute, and that the order of arrest has been, by the decision and order of the general term, in fact, vacated, although said condition has not been performed. We cannot now amend or review the order made at a previous general term; but only determine its proper construction and effect. The terms of that order are clear and explicit, and there can be no doubt as to its meaning. The required stipulation was not given, and consequently the order at special term, denying the motion to vacate the order of arrest, was affirmed, and said order of arrest remains in full force.

Upon what ground, then, can this execution against the person of the defendant be set aside? The Code (§ 288) provides that execution against the person of a judgment-debtor may issue, if the action be one in which the defendant might have been arrested, as provided in section 179. In this action the defendant was actually arrested, under the provisions of section 179; and the court, at general term, has affirmed an order made at special term denying a motion to vacate such order of arrest. I do not see how it is possible to decide that this is not an action in which the defendant might have been arrested while he is actually under arrest, and the court refuse to vacate the order by which he is held. As there is no other question in the case, the order made at special term must be affirmed, with ten dollars costs.

Order accordingly.

GREGORY a. WRIGHT.

Supreme Court, First District; At Chambers, June, 1860.

PLEADING.—SHAM ANSWER.

An answer which contains a denial of any material allegation of the complaint, if verified, cannot be stricken out as sham.

In an action for goods sold, or for services, the allegation of the value thereof in the complaint is material, and a verified answer containing a denial of that allegation cannot be stricken out as sham.

Motion to strike out an answer.

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BOCKES, J.—The motion is to strike out the answer as sham, under section 152 of the Code of Procedure, and no other or different relief is asked for.

It is now well settled that an answer which contains a denial of any material allegation of the complaint, if verified, cannot be stricken out as sham. The question, therefore, is whether this answer, being verified, contains a denial of any material allegation of the complaint.

The first paragraph of the answer refers to four items of the account stated in the complaint, and merely puts in issue the times when the items respectively were sold and delivered. As to these items, the issue made by the answer is entirely immaterial. This part of the answer is therefore frivolous; but by the recent decisions could not be deemed sham.

By the next paragraph of the answer, the defendant denies that certain items of the account mentioned in the complaint (specifying them in detail) were sold and delivered by the plaintiff to the defendant at the times therein set forth; or that such articles of the value therein set forth, were sold and delivered to him; or that such articles were sold and delivered to him on the terms therein set forth. The complaint avers that those items were sold and delivered at the times, of the value, and on the terms therein specified. Although the issue thus made is immaterial, as regards the times when the sales were made, still it is material as regards the value. The complaint also avers that plaintiff performed work and labor for defendant, of the kind, at the times, on the terms, at the prices, and of the value specified therein. The answer denies "that the work and labor mentioned in the complaint was ever performed, as therein stated, being of the value therein stated, or of any value whatsoever." This denial puts in issue the value of those services.

It follows, therefore, that the answer cannot be stricken out as sham. But inasmuch as the answer is inartistic, in some parts frivolous, and of doubtful integrity, the motion must be denied without costs.

NEW YORK ICE COMPANY *v.* NORTHWESTERN
INSURANCE COMPANY.*Supreme Court, First District; General Term, December, 1860.*AMENDMENT OF JUDGMENT.—POWER OF COURT TO AMEND ON
MOTION.

The court have not power to amend a judgment, on motion, by qualifying its provisions in a respect in which there was no mistake, nor any omission of a direction which would have been inserted, as of course, if originally asked for. A judgment dismissing the complaint without prejudice to a new action, cannot be amended on motion by giving leave to serve a new complaint in the same action. *So held*, where, by the limitation of the cause of action, no new action could be brought.

Appeal from an order amending a judgment.

This action was brought on an insurance policy, and by the terms of the policy, the time within which action must be brought upon it was limited. The action was tried by the court without a jury, and the complaint was dismissed on the ground that the cause of action was such that it should have been tried at a circuit before a jury. The dismissal was without prejudice to a new action. The decision is reported 10 *Ante*, 34. The time limited by the policy having expired, plaintiff obtained an order amending the order of dismissal, so as to allow him to serve a new complaint in the same action. The defendant appealed.

BY THE COURT.*—BONNEY, J.—This action was tried at special term, held on 23d December, 1859, judgment was rendered that the complaint be dismissed without prejudice to plaintiff's right to bring an action at law upon the policy of insurance set out in the complaint. On application of the plaintiff, an order was made at special term on 5th July, 1860, that said order

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(judgment), dated 23d December, 1859, be amended, as of 5th July, 1860, by adding after the words "set out in the complaint," the words, "or the plaintiffs may serve a new complaint at law in this action on payment by the plaintiff to the defendants of all interlocutory costs since the filing of the complaint, and costs of this motion, ten dollars." From this order of 5th July the plaintiff has appealed.

By the terms of said policy, the time within which an action may be brought upon it is limited, and that time has expired. And the amendment of said judgment is therefore necessary to enable the plaintiff to prosecute an action at law upon it. The amendment appears to me not unreasonable or inequitable, but I do not see that the court has any power to make it. Final judgment, dismissing the complaint, was duly rendered and entered. And there is no allegation or pretence of any mistake or omission therein. The judgment is precisely what it was intended to be, and disposes of the whole case. The amendment has been asked for and granted upon considerations not presented to the court at the hearing, and is intended to give to the plaintiff relief not then contemplated by any one.

The Code (§ 173) authorizes the court, after judgment, to amend any pleading, process, or proceeding, by adding or striking out the name of any party, by correcting a mistake in any respect, by inserting other allegations material to the case, or conforming the pleadings or proceedings to the facts proved; but such authority does not reach this case.

In the case of *Clark v. Hall* (7 *Paige*, 382), it was held by the chancellor that a decree cannot be varied in substance, without a rehearing, but it may be amended or corrected on motion as to mere clerical errors, or by inserting any provision or direction which would have been inserted, as a matter of course, if the same had been asked for at the hearing, as a necessary or proper clause to carry into effect the decision of the court.

This case states the power to amend a decree or judgment on motion, in as broad terms as any that has fallen under my notice, but in my opinion is not authority for making the order now before us; and in my judgment that order should be reversed, with ten dollars costs of appeal, to the respondent.

MORTON *a.* WEIL.*Supreme Court, First District; Special Term, March, 1860.*

CREDITOR'S ACTION.—PARTIES.—CAUSE OF ACTION.

Where the plaintiffs who are judgment-creditors, seek to obtain the debtor's property from persons to whom it was fraudulently passed away, they may unite such persons in one action, although such persons received the property in separate and distinct parcels.

In such case the cause of action is the same, viz., the fraudulent disposition of the debtor's property to the several defendants, although in several parcels. Hence it is an entire cause of action, affecting all the defendants, within section 167 of the Code of Procedure.

Form of a complaint in a creditor's action by numerous plaintiffs to set aside several distinct judgments, suffered in favor of, and transfers made to, numerous defendants, held sufficient on demurrer.

Demurrer to complaint.

The action was brought by L. P. Morton and sixty others, plaintiffs, creditors of Moses Bettman, deceased, against the administratrix of Bettman, and others, transferees of his property.

The amended complaint, to which the demurrer was interposed, charged that Bettman in his lifetime made fraudulent purchases of the various plaintiffs, and that after they had severally sued him, and after an injunction had been granted against him in a suit prosecuted in the name of some of the creditors, under an agreement that it should be for the benefit of all, twenty of the twenty-six defendants, with notice of plaintiffs' rights, obtained collusive judgments against him; and that subsequently Bettman, in violation of the injunction, made a general assignment for benefit of creditors to two of the defendants, one of whom was one of those who had obtained an alleged collusive judgment. That subsequently, two other of the defendants received from Bettman certain of his property, and concealed it to defraud his creditors; and that still other two of the defendants aided in such concealment, and also themselves received property of Bettman for the like purpose.

The allegations of the complaint were in the following form :

That at the time of the several sales and deliveries of goods to Moses Bettman, late of the city of New York, now deceased, and of the commencement of the several actions for the recovery thereof hereinafter set forth, the plaintiffs in this action constituted the several mercantile copartnership firms herein named, except as to said William M. Waterbury, who traded alone, viz.

[Here followed an enumeration of the several firms which the parties-plaintiff respectively composed.]

And plaintiffs further show, that they, as such co-partnership firms, and the said William M. Waterbury, did, prior to the 13th of April, 1857, sell and deliver certain goods and merchandise to the said Moses Bettman, now deceased, to large amounts, and which were sold upon various terms of credit as to time, and which time of credit had not expired pursuant to the terms thereof at the date of the bringing of the several actions for the recovery thereof, as hereinafter named; that said Bettman was guilty of a fraud in contracting the several debts upon which said several actions were brought; that he represented to one or more of said plaintiffs, when he purchased said goods, that he was solvent and in good circumstances, and would pay for them, but that he had no intention of paying for said goods at the several dates of the purchases thereof, and that the several plaintiffs therein sold the goods specified, relying upon the belief that said Bettman was solvent, bought them in good faith, and would be able, and intended to pay therefor at the maturity of the credit upon which they were sold; and further, said plaintiffs show that said Bettman, after the said purchases, and pursuant to his original intention to defraud, sold, transferred, and disposed of certain portions of his property, of great value, and threatened to make other sales, transfers, and dispositions of the remainder of his property with intent to defraud his creditors, including said plaintiffs; and by reason of such fraudulent acts and doings on the part of said Bettman, said plaintiffs were entitled to judgments against said Bettman, for the amount and value of the said goods, so by them severally sold and delivered to said Bettman, notwithstanding the said several terms of credit had not at that time

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expired ; that such proceedings were had in said actions, that judgments were rendered by said Supreme Court in favor of said several parties, plaintiffs in said several actions, and on the 6th day of March, 1858, judgments were perfected and duly docketed in the office of the clerk of said court, at the City Hall, in the city of New York, against said Bettman, and in favor of said several plaintiffs, for the several amounts of their claims and interests and the costs of such actions, by which judgments said Moses Bettman was adjudged guilty of the frauds herein charged, as in and by said judgments, and the judgment-rolls therein will more fully appear ; that the several amounts of said judgments are as follows. [Describing them by the plaintiffs' names in each, and the amount.] That in and by the several complaints in said several actions, the plaintiffs in each of them asked for an injunction to restrain said Moses Bettman from making any transfer or other disposition of any of his property, and from any interference therewith whatever, and that a receiver might be appointed with the usual powers of receivers, as will more fully appear on reference to said several complaints ; that prior to the commencement of said several actions, and on the 13th of April, 1857, at the request of the said plaintiffs in said several actions, Moncrieff Mitchell, Gideon Pott, and James Pott, composing the mercantile firm of Mitchell & Pott, who were also creditors to a large amount of said Moses Bettman, commenced an action in this court against said Bettman upon a complaint founded upon the same circumstances, and of the same character and description in all respects, as by said complaint will more fully appear ; that by an agreement in writing between the plaintiffs first aforesaid, and the plaintiffs last named, said suit was commenced and prosecuted by them as well for the benefit and at the expense of the plaintiffs first aforesaid as for themselves, as was alleged in said complaint, and the avails and proceeds of any collections that might be made therein, were to be shared pro rata by and between said parties and others hereinafter named ; that upon said complaint, and an affidavit verifying the principal facts therein stated, said plaintiffs having given the security required by law, an order of arrest was granted by one of the justices of this court, directing the sheriff of this city and county to arrest, and hold said Bettman to bail, on account of the fraud therein alleged, in the sum

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of \$5,000, and upon the same papers the same justice signed an injunction-order, of which the following is a copy :

[Here followed an injunction-order in the usual form.]

That upon the same day said Bettman was duly arrested under said order made for that purpose, and said injunction-order was duly served upon him. That at the time of the issuing and service of such injunction-order and of the said arrest, the said Bettman had property in his possession and under his control as owner of the value of at least the sum of \$100,000, upon which the said injunction-order was operative according to law ; of all which facts the defendants in this action had due notice at or about that time ; that subsequently, and on the 20th of April, 1857, Hercules E. Gillelan and Adam H. Gillelan, composing the firm of Gillelan Brothers, on a like request, and under the same agreement as to avails and proceeds and expenses, having claims of a large amount of a similar character against said Bettman, commenced a like action in this court against said Bettman, upon a complaint of the same character in all respects, containing the same averments except as to the amount of their claims ; and upon said complaint and a like affidavit, and the proper undertaking duly approved, obtained from a justice of this court an order to arrest said Moses Bettman for the frauds therein alleged, pursuant to statute, and to hold him to bail in the sum of \$5,000, and upon the same papers said justice signed and issued a like injunction-order, dated said 20th day of April, 1857, which orders were on the same day duly executed and served upon said Moses Bettman, while he was still the possessor and owner of such property, as by reference to said complaint, affidavit, undertaking, and orders, will, among other things, more fully appear, of all which facts the defendants herein had due notice ; that, as was well known to the defendants herein at that time, the plaintiffs herein were jointly interested with the plaintiffs in the last two-named actions as above described, and contemplated and intended further to unite with them in said prosecutions by the commencement of their said actions, as soon as practicable ; that while said orders of arrest and said injunction-orders were in full force, as was also well known to said defendants herein, the said defendants [naming twenty of the twenty-six defendants], having

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severally as individuals and executors, and copartners as aforesaid, claims of various kinds and amounts against said Moses Bettman, which claims plaintiffs charge were in part without consideration and invalid, and all of which were not due and payable by the terms of the several contracts and agreements out of which the indebtedness arose, and were not valid and subsisting claims against the said Moses Bettman or his property, and said defendants, conspiring with each other and with said Moses Bettman, and falsely and fraudulently contriving to defraud these plaintiffs out of their just claims against said Moses Bettman and his property, and of their lien and priority of claim upon such property, did arrange and agree with said Bettman to accelerate the time of payment of their said several claims and demands against said Bettman, so as to make the same appear presently and immediately due and payable, and did receive from him notes therefor, payable at once, so as to enable said parties to commence, and they did severally thereupon commence actions against said Bettman for the recovery of such claims, and in pursuance of such fraudulent design and agreement between said parties, said Bettman thereupon at once signed and delivered to said several parties consents and stipulations allowing said parties to take judgment against him, said Bettman, forthwith, for the several amounts of their respective accelerated claims and costs, whereupon the said defendants severally and immediately entered their several judgments against said Moses Bettman, as follows. [Describing the judgments.] That said judgments were all taken and entered upon similar confessions, or offers, and consents of said Moses Bettman, pursuant to, and in furtherance of such fraudulent and corrupt conspiracy and design to defraud these plaintiffs, and immediately thereupon the several plaintiffs in said judgments, in the further prosecution of said corrupt and fraudulent agreement and design, caused executions to be issued and directed to the sheriff of the city and county of New York, and directed him to, and he did thereupon at once levy upon the whole stock of merchandise of said Moses Bettman, by virtue of said several executions, being a part of said property so possessed and owned by him; that thereupon, and on or about the 6th of May, 1857, and before any sale had been made of said merchandise under said executions, plaintiffs, and the said Mon-

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crieff Mitchell and others, and Hercules E. Gillelan and another, in said other two actions named, caused a notice of their rights and claims in regard to said property to be served upon the said sheriff, and upon the defendants [naming the same twenty last before named], and thereby notified said defendants that they and each of them would be held responsible for any interference with the said property of said Bettman, contrary to the said injunction-order, and the lien or charge acquired thereby, and by the service thereof, and to the rights and claims of the plaintiffs as aforesaid; and also at the same time caused a like notice to be served on the attorneys of the said Moses Bettman; that on the 30th day of June, 1857, in eight of the said actions against said Bettman [describing them by the names of the several parties-plaintiff], eight several attachments were issued out of this court against the property of said Bettman, based upon the same complaints and affidavits, by which complaints and affidavits it appeared that a cause of action existed in favor of said plaintiffs, against said defendant, for a money-demand arising on contract, and that said defendant had fraudulently contracted the debts therein specified, and had assigned and disposed of his property with intent to defraud his creditors, as by said affidavits will, among other things, more fully appear, and being for the full amounts of the several claims of said parties, afterwards included in their several judgments as aforesaid; and, the said plaintiffs having severally furnished the security required by law, which said attachments, on the 30th day of June, 1857, were delivered to the sheriff of the city and county of New York, with a notice that the plaintiffs in said attachments would claim any moneys collected by him by virtue of the executions in favor of any of said defendants in this action, and directing said sheriff to, and said sheriff did thereupon serve copies of such several attachments upon the said defendants, as were served with the notices as aforesaid, together with a notice thereon indorsed, apprising said defendants that it was intended by said attachments to seize, levy upon, and claim any money or property which they might receive by virtue of their said judgments or executions, which copies, attachments, and notices were served on or about the date of the said attachments, and prior to the receipt by said defendants of any money under said executions.

And plaintiffs further show, that in the fifteen several actions wherein certain of the plaintiffs in this action [naming them], were plaintiffs, and said Bettman was defendant, attachments were also issued against the property of said Bettman, for the same cause, and on the same ground as aforesaid, of a similar character of those named in the above actions, and the same securities having been given and approved by a justice of this court; and said attachments directed the sheriff of the city and county of New York, to collect the several amounts of plaintiffs' claims, named in this said complaint, and costs, and which were embraced in their several judgments finally recovered as aforesaid, which attachments were granted on the 24th day of August, 1857, and were on the 28th of August, 1857, delivered to said sheriff, with directions to serve copies with the same kind of notices as were indorsed upon the copies served in the first-named eight actions upon the same defendants, as by said affidavits, undertakings for security, attachments, and notices, will, among other things, more fully appear; and thereupon, and about the date last named, said sheriff did serve upon each of said defendants a like copy of each of said fifteen attachments, with a similar notice indorsed thereon, which were so served prior to the receipt by said defendants of any money, under their said executions; that said executions in favor of all of said defendants, who took judgments against said Bettman, by stipulation and confession as above set forth, were all paid to said defendants in full, with interest, on or about the 3d day of September, 1857, by said sheriff, out of moneys arising from the sale of the property of said Bettman so seized upon, on or about the 25th day of April, 1857, by virtue of such executions, and which he so owned at the time of the service of the said injunction-orders, and in violation and fraud of the plaintiffs' rights, acquired by said original injunction-orders, said arrest, and said several attachments and notices so served, as above described and set forth.

And plaintiffs further show, that on or about the 13th day of April, 1857, the said Moses Bettman, in violation of the said injunction-orders, and of the rights acquired by the plaintiffs under the same, made a general assignment, without any actual consideration being paid therefor, of his property to the defendants Emanuel Bernheimer and Max Weil [of whom the latter

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only, was one of the twenty defendants last above mentioned], as assignees, for the benefit of his creditors, including the property so possessed and owned by him, at the time of the service of said injunction-orders, by which he gave preference of payment to all the said judgments so confessed, or allowed by him to said defendants, over and above all other debts against him, and making other fraudulent preferences as against the claims of these plaintiffs, and providing for the payment of certain fictitious claims and demands, prior to the payment of plaintiffs' claims, as by said assignment in the hands of said assignees will more fully appear; that as was well known to said assignees, at the time of receiving said assignment, said Bettman fraudulently withheld a large amount of property from the effect of said assignment, and that such withholding and concealment of said property was with the consent and favor of said assignees, and which assignment these plaintiffs charge is fraudulent and void as to all of plaintiffs' claims and demands, and was made by said Bettman, with the intent to hinder and delay, defeat and defraud the creditors of said Bettman; that at the same time at which said notices, and said copies of attachment with notices indorsed, were served upon the other defendants as above described, a like notice, and copy attachments and notice, were served upon said assignees; and that such notices apprised said assignees that said assignment would be treated as fraudulent and void as to the plaintiffs; that notwithstanding such rights of plaintiffs, and such notices and services, said assignees proceeded to carry out and execute said assignment, and have collected, received, and disposed of large amounts of such property, and disposed of portions of the same under said assignment, the particulars whereof plaintiffs have no knowledge of, but pray may be inquired of in this action; and that said assignees so received the sum of about \$1,700 from the sheriff of the city and county of New York, being the surplus of moneys collected by him from sales under said executions, after paying off said judgments and executions of said defendants, as above specified.

And plaintiffs further show, that on or about the 27th day of March, 1857, the defendants Abraham Gump and Solomon Gump [who were not named among the twenty above mentioned], as copartners as aforesaid, received from said Moses

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Bettman, for the purpose of concealing the same from his creditors, a large amount of dry goods of the value of some nine thousand dollars, under a pretence of sale by said Bettman to said defendants Gump, for which no consideration was in fact paid, but with the agreement and understanding that the same were to be treated and accounted for by said defendants Gump, to said Bettman, as his said Bettman's property; that said defendants concealed the same in this city, and have either sold and disposed of the same according to such agreement, paying over the proceeds thereof to said Bettman or his order, or they still hold the same subject to said original agreement, and as the property of said Bettman, or his legal representatives; that no part of said property was included in or covered by said assignment; that said defendants Gump had due notice of said injunction-orders and arrests, and the grounds upon which they were based, immediately upon their being issued, and they were also served with the same kind of notices as to plaintiffs' rights, and copies of said attachments with notices thereon indorsed, at the same time that the other defendants were served therewith, as above specified.

And plaintiffs further show, that on the 11th day of March, 1858, executions were duly issued, directed, and delivered to the sheriff of the city and county of New York upon the said several judgments of the plaintiffs, in due form of law, which executions have been duly returned by said sheriff to the clerk's office of this court, with his returns indorsed thereon to the effect that he was unable to make any thing upon said executions, or either of them, and that said defendant Bettman therein had no real or personal property out of which to collect any part of any of said executions, as by said executions and returns thereon, on file in said clerk's office, will more fully appear; and said judgments remain wholly unpaid and unsatisfied; that said Bettman resided in said city at the time of the issuing and return of said executions; that on or about the 24th day of April, 1858, said Moses Bettman departed this life at the said city of New York, intestate, and that on or about the 7th day of January, 1859, letters of administration upon the estate of said Moses Bettman, were duly issued by the surrogate of the city and county of New York to the defendant Henrietta Bettman, widow of said Moses Bettman, whereby she be-

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came, and is, the sole administratrix of the goods and chattels, rights, and credits of said Moses Bettman, deceased.

And plaintiffs further show, that the defendants David and Solomon Hausmann [who were not named among the twenty above mentioned] aided the said defendants Gump and said Moses Bettman, in the secreting of said dry goods and merchandise so left with said Gump, the same having been secreted in their store in this city; and that the said defendants David and Solomon Hausmann also received a large amount of accounts, bills receivable, notes, and other property from said Bettman, without paying any consideration therefor, at or about the time said original injunction-orders were served upon said Bettman; that said property belonged to said Bettman, and was so received by said last-named defendants as the property of, and to be accounted for to, said Bettman; that the said act of receiving the same was for the purpose and with the intent of placing the same beyond the reach of, and of defrauding the creditors of said Bettman of the same; that no part thereof was ever included in, or transferred by said Bettman's assignment, and no part of it was ever paid over to any of the creditors of said Bettman; that all such dispositions of said property as are herein mentioned were made by said Bettman, and received by said defendants, with the full knowledge of his insolvent condition; that these plaintiffs do not know the particulars or full details of such transactions, as to the nature and extent of the property so fraudulently disposed of and secreted by said defendants, at the request and for the benefit of said Bettman, but ask that they may be inquired of in this action; that the same kind of notices and copies of attachment were served upon said defendants last named, and at the same time as upon the other defendants, as above described; and said defendants Hausmann and others had from the commencement a full knowledge of all of plaintiffs and their associates' proceedings and claims against said Bettman and his property; and that said defendants have either converted said property into money, and paid it over to said Bettman, or on his order, in fraud, and with a full notice of plaintiffs' legal rights in the premises, or they still hold the same and the proceeds thereof, and are accountable to plaintiffs therefor.

Wherefore the plaintiffs pray that by the judgment of this

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court in this action the said several judgments in favor of said defendants against said Moses Bettman, and the executions issued thereon, may be declared fraudulent and void as against the claims and judgments of these plaintiffs, and as to all property of said Bettman held by him at the time of the service of said injunction-orders; that the said defendants who so received the several amounts of their said judgments from the sheriff on their executions, may be required to account for and pay over the several amounts so received with interest to the receiver to be appointed as hereinafter specified; that the said assignment may be declared to be fraudulent and void, and that said assignees, Max Weil and Emanuel Bernheimer, may be required to render an account, under oath, of the property and assets received by them under such assignment, and to transfer the same to said receiver; that the said defendants Gump may also be required to account and pay over, under oath, to said receiver, for the said merchandise so fraudulently received and concealed by them; and that said defendants Hausmann may also be required to account, under their several oaths, and pay over and transfer to said receiver all of such property so fraudulently received by them, and that a receiver of such property and assets may be appointed by this court with the usual powers of receivers in like cases; and that out of the proceeds of said property and effects, the plaintiffs may be paid the full amounts of their said several judgments, interest, and the cost of this suit, and that the plaintiffs may have such other or further relief in the premises as may be just and equitable.

BARNEY, BUTLER & PARSONS,

Plaintiffs' Attorneys.

[Verification.]

One of the defendants who was named in the complaint as one of the twenty who obtained collusive judgments, demurred to the complaint on the grounds, 1. That there was a defect of parties-plaintiff.

2. That there was a defect of parties-defendant.

3. That several causes of action had been improperly united.

4. That the complaint did not state facts sufficient to constitute a cause of action.

5. That the complaint did not state facts of, and concerning

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the demurrant sufficient to constitute a cause of action against him.

Benedict & Boardman, for the defendants, in support of the demurrer.

George W. Parsons and Wm. Curtis Noyes, attorneys for the plaintiffs, opposed.

INGRAHAM, J.—Upon all the grounds stated in the demurrer in this case, except the third, I am of the opinion that the demurrer is not well taken.

The third cause of demurrer is, that several causes of action have been improperly joined.

The object of the complaint appears to be, to set aside various liens by judgment and by assignment, on the debtor's property, for alleged fraudulent acts on the part of the defendants, and to have the property, which was covered by such liens, or received in payment of the claims of those creditors who were made defendants, and the proceeds of such property, applied to the payment of the several judgments held by the various persons named as plaintiffs.

So far as these claims, whether by conveyance, judgment, or delivery, affect the same property, they are properly united together; but the point raised in the case is, whether different persons, having different liens or conveyances, by which they claim different pieces of land, or different parcels of personal property, may all be included in one action, and required to contest their respective titles to separate portions of the debtor's property.

By the Code, it is provided, that the causes of action to be united, must affect all the parties to the action. (*Code of Procedure*, § 167.)

In the present case, part of the object of the complaint is to have the judgments recovered by several different judgment-creditors declared void. Another portion of the complaint charges that Bettman, the debtor, made an assignment for the benefit of certain creditors, and charges fraud in regard thereto, and claims to have that declared void.

Another portion of the complaint avers, that Hansmann and

Gump, with Bettman, were concerned in secreting the goods and property of Bettman, for the purpose of concealing the same from the creditors, for the benefit of Bettman.

All these acts are declared to be fraudulent; but between the three classes above referred to, I can find in the complaint nothing that unites them together, or that shows them to be jointly interested even in any remote degree, except as to the general fraudulent intent in the debtor's disposition of the property. It was said, on the argument, that these defendants were charged with conspiring together, and that the conspiracy was the cause of action, which allowed the defendants to be all united together. On reference to the complaint, however, it will be seen that no joint conspiracy of all the defendants is anywhere alleged, but that the conspiracy of a portion only is averred, with allegations that the other defendants had notice of the facts set up in the complaint as to the plaintiffs' rights.

The only question then is, whether, where the plaintiffs, who are judgment-creditors, seek to obtain the debtor's property, from persons to whom it was fraudulently passed away, they may unite such persons in one action, although the latter received the property in separate and distinct parcels.

That such an action could have been sustained before the Code, I have no doubt.

In *Brinkerhoff v. Brown* (6 *Johns. Ch.*, 139) it was held that judgment-creditors of a corporation might proceed against the trustees, and others, to recover the property of the corporation, which had been withdrawn from the reach of their executions by the fraudulent acts of the defendants, although having different interests in the property.

In *Fellows v. Fellows* (4 *Cov.*, 682) the chancellor says: "The separation of the property into portions is a part of the fraud, and to allow that such a separation shall render separate suits necessary, would be to allow success to the fraud itself, so far as multiplicity of suits may impede the recovery of just demands."

Justice Woodworth states the rule to be, that "unconnected parties may be joined in a suit where there is one connected interest among them all, centring in the point in issue in the cause;" and again he says: "The claim against all of the defendants is of the same nature. The fraud alleged is the same.

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The transfer being fraudulent, the property was not changed by being put into the hands of the defendants. They are, therefore, all necessarily concerned in the thing to be recovered, although they set up distinct interests to separate parcels."

Chief-justice Savage, in the same case, says: "The common point of litigation is the fraudulent transfer of the property of the debtor to the other defendants. If the source of their title be corrupt, the property is taken with the taint of corruption. This is the common point of litigation, the decision of which affects the whole, and will settle the rights of all." And in *Boyd a. Hoyt* (5 *Paige*, 65), the chancellor says: "Where the object of a suit is single, but different persons have or claim separate interests in distinct or independent questions, all connected with and arising out of the single object of the suit, the complainant may bring such different persons before the court as defendants; and if the object of the present bill was to reach the property of the debtor in the hands of these several defendants, which ought to be applied in satisfaction of the amount due on the judgment, and to have it thus applied, I should find no difficulty in sustaining the decision overruling these demurrers."

From these cases, which are very similar in their objects to the present action, it is apparent that such actions might have been maintained before the Code. It is also manifest that the courts throughout, in these cases, have based their decisions upon the supposition that the cause of action was the fraud of the debtor in disposing of his property, and that there was but one cause of action, although the defendants held the property of the debtor in separate parcels, in which there was no joint interest. They all hold by the same title, and are all affected by the same taint, and this is the cause of action on which the right of the plaintiffs rest.

Applying this rule to the provisions of the Code, there is no room for any other decision. The cause of action is the same, viz.: the fraudulent disposition of the debtor's property to the several defendants, although in several parcels. The same reasons that existed before the Code for uniting them in one action still remain; and as the words of the section of the Code above referred to do not prevent it, I think the rule still continues, and that the demurrer is not well taken.

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The plaintiffs are therefore entitled to judgment on the demurrer, with leave to the defendants to answer on payment of costs.

Order accordingly.

THE LEE BANK *a.* KITCHING.

New York Superior Court; General Term, December, 1860.

BILLS OF EXCHANGE. — IRRELEVANT DEFENCES. — MOTION TO STRIKE OUT.

Although the holder of a bill discounted it entirely on the faith of security provided by an indorser for its payment, and knowing that the drawer and acceptor were insolvent, he is not thereby compelled to resort to such security before recovering against the drawer or acceptor.

If one of several defences set up in an answer is insufficient, it may be struck out on motion, though it might also have been reached by a demurrer.

The ability of the plaintiff to demur, under section 153 of the Code of Procedure, to one or more of the defences set up in the answer, does not preclude a motion, under section 152, to strike out such matter from the answer as irrelevant.

Irrelevancy in pleading as used in the Code, like impertinence as used in Chancery practice, comprehends both prolixity or needless details of material matter, and matter out of which no cause of action or defence could arise between the parties in the particular suit.

Appeal from an order striking out a portion of an answer.

The complaint was on two bills of exchange, drawn on the defendant by one P. C. Kane in favor of Mrs. E. Kane. It alleged that the drawer delivered them for valuable consideration to the payee, and that they were subsequently accepted by defendant; and that thereafter, and before maturity, they were indorsed by the payee for valuable consideration to the plaintiffs; and were not paid at maturity, though duly demanded.

The first paragraph of the answer denied (for want of information or belief) that the bills were delivered to the payee for value, or to the plaintiffs for value; and denied that defendant

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ever received any consideration for his acceptances, or that he was indebted to plaintiffs thereon.

The remainder, which the plaintiff moved to strike out, was as follows:

"That when he accepted the said drafts, Pierre C. Kane was his debtor; and that he accepted them merely for said Kane's accommodation, and to enable him to raise money from the Lee Bank, and upon the faith of an assurance received from said Kane upon the authority of Mrs. Edith Kane, that she had already provided the means for their payment, and had placed property in the hands of the said bank to the extent of \$15,000 to cover these other drafts to that amount, and that defendant's said acceptance would therewith be provided for at their maturity.

"And this defendant further answering, says, that the said Edith Kane did, as he is informed and believes, furnish security for the purposes aforesaid, at said Pierre C. Kane's request, and that the said bank now holds the same; and that upon the receipt thereof, the said bank discounted the said acceptances, at the request and for the benefit of the said Pierre C. Kane; and that at the time of such discounts, this defendant and the said Pierre C. Kane were both insolvent;—such facts were well known to said bank;—and that said bank discounted the said acceptances entirely upon the faith and credit of the security, &c., furnished by Mrs. Kane.

"And this defendant further says, that when he accepted the said several drafts, he relied upon the arrangement hereinbefore set forth to provide for their payment by Mr. and Mrs. Kane; and that if he should now be obliged to pay the same, he would be remediless in the premises; and he respectfully submits to this honorable court, that, under the circumstances of this case, it would be inequitable and unjust to compel him to pay the said acceptances, or either of them, until after the said bank shall have first applied the securities, &c., as aforesaid, placed in its hands towards the payment thereof; and he therefore prays that before final judgment shall be entered herein, the plaintiffs may be ordered to apply the said property, &c., placed in the hands of the said bank, or the proceeds thereof, in payment of his said acceptances, or that he may have such other and further relief in the premises as shall be just and equitable."

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Plaintiff's motion to strike out this part of the answer as irrelevant, was granted, at special term, by Mr. Justice Moncrief, and defendant appealed.

John N. Taylor, for the appellant.

F. C. Bliss, for the respondents.

By THE COURT.—HOFFMAN, J.—The plaintiffs sue upon an acceptance, by the defendant, of a bill drawn by P. C. Kane in favor of Mrs. Edith Kane, and indorsed by her. The complaint states a due indorsement of the bill to the plaintiffs; a demand for payment, and refusal. There is another cause of action upon another bill, made and accepted under the like circumstances.

The answer sets up that P. C. Kane was the defendant's debtor; that he accepted the bill for Kane's accommodation, to enable him to raise money from the bank, upon the faith of Mrs. Kane having provided security for the payment by property or funds placed in the hands of the bank, to cover these and other similar drafts; that Mrs. Kane had made such a deposit of property with the bank; that the bank discounted the bill on receipt of such property; that both Kane and defendant were insolvent, and such facts were known to the bank; "and that said bank discounted such acceptances entirely upon the faith and credit of the security so furnished by Mrs. Kane." He asks, therefore, that the bank should first apply the securities so placed in their hands, before resorting to him on the acceptances.

Thus an acceptor of a bill of exchange is to be freed from liability, because the holder who discounted it had securities placed in his hands by the indorser, and is averred to have discounted the bill entirely on the faith and credit of such security. In other words, he would not have discounted it unless he had possessed such securities. There is not a word in this to show that they meant, much less agreed to discount it without having a right to resort to the acceptor. Proof of such an agreement would not be allowed. That the acceptance was an accommodation acceptance, is unimportant. The liability is the same as if it had been based on funds.

There is no equity whatever to compel the holder to suspend proceeding on this discounted acceptance, until he has exhaust-

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ed other securities in his possession. The case seems to us too clear to need any other argument, or the citation of any authorities.

The only question raised which requires notice, is whether the motion to strike out was the appropriate remedy.

By section 152, sham and irrelevant defences may be stricken out on motion.

I have always considered that irrelevancy in this, and section 160, meant the impertinence of the old chancery system. That was either prolixity or needless details of material matter, or something out of which no cause of action or defence could arise between the parties in the particular suit.

Cases of both classes are cited in 1 *Hoffman's Ch.*, 280, 282. *Beaumont a. Beaumont* (5 *Mad.*, 51) is a striking case of an answer, setting forth the details of prices and particulars in an auctioneer's catalogue, certainly not immaterial, but clearly superfluous. *Corbet a. Tottenham* (1 *Ball & Beatty*, 61) is an instance of the other class. Lord Manners said: "I do not think the plaintiffs are bound either to reply to these charges in the defendant's answer, or to go into evidence to disprove them, and therefore they ought not to remain on the record."

This distinction is adverted to in *Bowman a. Sheldon* (5 *Sandf.*, 660). In various cases irrelevancy, under the Code, is treated as matter which does not tend to constitute a cause of action or defence; matter which, even if true, cannot affect the decision of the court in the case. (*Stewart a. Bouton*, 1 *Code R., N. S.*, 404; *Averill a. Taylor*, *Ib.*, 213; *Clark a. Harwood*, 8 *How. Pr.*, 470; *Edgerton a. Smith*, 3 *Duer*, 614.)

Section 160 appears to relate to cases in which, in the same pleading, or in a distinct, separate part of a pleading, irrelevant matter is mingled with pertinent matter. *Franklin a. Keeler* (4 *Paige*, 382) furnishes an example of this.

But section 152 refers to an answer, or defence, which in its entirety is either sham or irrelevant. I read the section thus—That a sham answer or defence and an irrelevant answer or defence may be stricken out on motion.—The received definition of a sham answer is its falsity. It may be material and pertinent, and yet be stricken out as sham. (*The People, &c., a. McCumber*, 18 *N. Y.* (4 *Smith*), 315.) It need not, of course, be both sham and irrelevant.

The case of *Kurtz a. Dunbar* (5 *Duer*, 660) is an example of one portion of an answer being stricken out as irrelevant, where it would have constituted a cause of action, but could not be made available in that suit as a defence, not giving a right of set-off, and not constituting a counter-claim.

Slack a. Cotton (2 *E. D. Smith*, 398) is an instance of a distinct defence being stricken out as sham, under section 152.

In *Hecker a. Mitchell* (5 *Abbotts' Pr.*, 453) there was a motion for judgment under section 247, on the ground of the frivolousness of the answer. But there were two defences set up: one of which was, as pleaded, available; the other was frivolous. Mr. Justice Woodruff, while denying the motion as made for judgment, ordered the second defence to be stricken out, under the prayer for other relief.

The redress which a plaintiff can have, under section 247, by a judgment for frivolousness, can, of course, only be where every part of the answer is such.

The authorities referred to, seem to show that the ability of the plaintiff to demur (under section 153) to one or more of the defences set up in an answer, does not preclude a motion under section 152. A motion for judgment, under section 247, is a summary demurrer to an answer in cases in which a demurrer will lie; and so the motion to strike out part of an answer may be regarded as a summary demurrer to that part, and as giving a concurrent mode of relief.

Mr. Justice Harris, in *Stewart a. Bouton* (1 *Code R., N. S.*, 404), says: "This motion, to strike out irrelevant matter, is analogous to a demurrer, and should be decided on the same principles. If matter cannot be made the subject of a material issue, it should be struck out."

There are authorities to show that a demurrer will not lie to irrelevancy in a pleading. But it will be found that they are cases in which irrelevant matter has been united, in the statement of some substantive cause of action or defence, with material matter. Such was the case in *Watson a. Husson* (1 *Duer*, 242), and *Welch a. Hazleton* (14 *How. Pr.*, 97). They do not, therefore, support the proposition that a demurrer would not lie in a case like the present, nor could such a proposition be sustained under the clear language of section 153. They leave

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the question, whether the motion under section 152 may not also be resorted to, unaffected.

The order must be affirmed, with costs.

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Supreme Court, First District; General Term, Dec., 1860.

PARTITION.—AMENDMENT.—APPOINTMENT OF GUARDIAN OF INFANT LUNATIC.

A purchaser at a judicial sale is not necessarily to be discharged on account of formal defects in the verification of a petition for the appointment of guardian for an infant defendant in the action in which the sale is decreed, or formal defects in the authentication of the verification; but such defects may be supplied by amendment, *nunc pro tunc*.

After commencement of an action for partition, by service of summons on some of the defendants, the general guardian or committee of an infant lunatic who is named as a party and is interested in the subject-matter, may apply to the court for the appointment of a guardian *ad litem* for such infant lunatic, under the provisions of the Code. Personal service on such infant lunatic is not necessary.

If the petition of the committee in such case does not show that the infant lunatic resided with the petitioner, or was under his charge or custody, such omission, if it be a defect, may be cured by amendment after judgment.

Even if the provisions of 2 Revised Statutes, 817,—relating to proceedings for partition at law, upon petition,—can be deemed applicable to actions under the Code, those provisions only require notice of appointment of guardians to be served on resident minors, not on non-residents.

Appeal from an order made at special term, relieving Joseph Richardson from his purchase of certain premises sold under the judgment in partition in this action, on account of certain alleged irregularities in the proceedings.

The principal irregularity complained of, and that on which the decision at special term turned, was, that jurisdiction was not obtained of the person of the defendant, Samuel Mitchell, who was alleged to be an infant idiot, or lunatic, of the age of twenty years. It did not appear that process was served upon him, but after the suit was commenced, which was in October,

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1854; a petition for appointment of a guardian for him was verified by William J. Mounts, in December, 1854, describing himself as the guardian of said Mitchell.

This petition was in the following form :

[TITLE OF THE CAUSE.]

To the Justices of the Supreme Court :

The petition of William J. Mounts, of Warren county, Ohio, the guardian of Samuel Mitchell, an infant idiot about twenty years of age, respectfully sheweth :

That an action has been commenced against your petitioner's ward, in the Supreme Court of the State of New York, by William Rogers and Ann R., his wife, for partition of certain premises lately owned by Samuel S. Engle, deceased, situated in the city of New York. For a particular description of said premises reference is had to the complaint of the plaintiffs. But as your petitioner's said ward is an infant lunatic, as above set forth, he prays that S. B. Hilbert Judah, of the city of New York, counsellor-at-law, may be the guardian of your petitioner's ward in the defence of said suit, according to the statute in such case made and provided.

This December 1, 1854.

WILLIAM J. MOUNTS.

STATE OF OHIO, }
Warren County, } ss. :

On this 19th day of December, A. D. 1854, personally appeared before me, Jno. C. Dunlevy, judge of the Probate Court within and for said county, the above-named petitioner, William J. Mounts, who, being by me duly sworn, on oath deposes and says : That the foregoing petition, signed by him, is *true* of his own knowledge, except as to the matters therein contained stated from information and belief, and as to those matters he believes it to be true.

WILLIAM J. MOUNTS.

Sworn and subscribed before }
me, the day and year afore- }
said. }

JNO. C. DUNLEVY,
Probate Judge.

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THE STATE OF OHIO, }
 Warren County, } ss.:

I, J. M. Warwick, clerk of the Probate Court within and for said county, do hereby certify, that John C. Dunlevy, before whom the above affidavit was taken, is sole judge of the Probate Court in and for said county, duly qualified and commissioned as such, and that said affidavit before him taken and acknowledged is in due form of law.

Witness my hand, and the seal of said court, at
 [L. s.] Lebanon, this 20th day of December, A. D.
 1854.

J. M. WARWICK,
 Clerk Prob. Ct.

STATE OF OHIO, }
 Warren County, } ss.:

I, John C. Dunlevy, judge of the Probate Court in and for said county, hereby certify, that J. M. Warwick, whose certificate is attached above, is clerk of said court, duly commissioned and qualified as such, and that his certificate and attestation above is authentic, and in due form of law.

Witness my hand at Lebanon, this Dec. 20, A. D. 1854.

JNO. C. DUNLEVY,
 Probate Judge.

I hereby consent to become the guardian *ad litem* of Samuel Mitchell in the above suit.

S. B. H. JUDAH.

December, 1854.

In January, 1855, an order was made at the special term in New York, appointing said Judah such guardian on his executing the proper bond, which was done; and thereafter said Judah put in an answer for said Mitchell in said action, and the suit was prosecuted to final judgment in 1859, the final decree reciting that Judah appeared as counsel for the defendant.

At the referee's sale of the premises, Richardson became the purchaser of the premises at \$80,250, paid the ten per cent. required to be paid upon the purchase at the time, executed a memorandum or certificate of the purchase, and thereafter applied by petition to be discharged therefrom for the alleged

irregularities above mentioned, and others not material to be noticed.

Upon that petition, and upon opposing affidavits, the motion was heard at special term and granted. The decision is reported 10 *Ante*, 306. From that decision the plaintiffs appealed.

Benjamin Billinge and *Chas. W. Sandford*, for the appellants.—I. Personal service of summons is not necessary, a voluntary appearance being equivalent, either by infants or adults. (*Varian v. Stevens*, 2 *Duer*, 635, affirmed by Court of Appeals; *Disbrow v. Folger*, 5 *Abbotts' Pr.*, 53; *Croghan v. Livingston*, 17 *N. Y.*, 218; S. C., 6 *Abbotts' Pr.*, 350; *Lyle v. Smith*, 13 *How. Pr.*, 104; *Wellington v. Claason*, 9 *Abbotts' Pr.*, 175; S. C., 18 *How. Pr.*, 10; *Carpenter v. New York & New Haven R. R. Co.*, 11 *How. Pr.*, 481.)

II. The appointment of a guardian *ad litem* for Samuel Mitchell, an infant idiot, residing out of the State, upon the petition of his guardian, was regular. 1. The committee of a lunatic defendant can have a guardian *ad litem* appointed as a matter of course. (*New v. New*, 6 *Paige*, 237; *Heller v. Heller*, 6 *How. Pr.*, 194; 1 *Barb. Ch.*, 86; *Shelf. on Lun.*, 424, 425; *Wilson v. Grace*, 14 *Ves.*, 172; *Story's Eq. Pl.*, § 70; 1 *Dan. Ch.*, 203; *Mit.*, 104.) 2. The equity jurisdiction and practice of the Supreme Court binds parties to a suit in partition independent of the statute. (*Mead v. Mitchel*, 17 *N. Y.*, 210; *Croghan v. Livingston*, *Ib.*, 218; S. C., 6 *Abbotts' Pr.*, 350; *Myers v. Rasback*, 4 *How. Pr.*, 83.) 3. Jurisdiction over infants is obtained by the appointment of guardians *ad litem*. (*Mead v. Mitchel*, 17 *N. Y.*, 210.) And this although the petition was not properly verified. (*Disbrow v. Folger*, 5 *Abbotts' Pr.*, 53.) 4. The Revised Statutes in relation to partition did not contemplate any service or notice upon minors out of the State: but provide for the appointment of guardians *ad litem* for such defendants by the court upon application. (2 *Rev. Stat.*, 4 ed., 577, § 2.) And these provisions *apply to actions* for partition brought under the Code. (*Code*, § 448. See *Althause v. Radde*, 3 *Bosw.*, 410, 432.)

III. The court has full power to amend at any time. (*Croghan v. Livingston*, 17 *N. Y.*, 218; S. C., 6 *Abbotts' Pr.*, 350; *Althause v. Radde*, 3 *Bosw.*, 410.)

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IV. The order to discharge the purchaser was contrary to the interests of the infants, and the rights of all the parties, plaintiffs and defendants, and should be reversed, and an order made to compel the purchaser to complete his purchase.

V. The order allowing fifty dollars costs of motion is irregular, and so is the allowance of one hundred dollars for examining title.

George T. Strong and Marshall S. Bidwell, for the respondent.—I. The court will not reverse a judgment unless it is clearly erroneous. Even great doubts are not sufficient cause for interfering with the judgment. (*Pearson v. Lynch*, 1 *Moll.*, 603; *Lloyd v. Ld. Trimblestone*, 2 *Moll.*, 81; *Wyatt v. Ingram*, 3 *Hagg. Ecc.*, 469; 1 *Barb. Ch.*, 395.) Here the decision was clearly right.

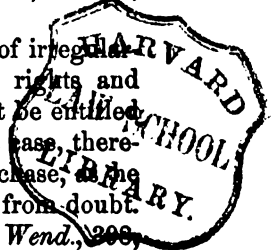
II. The petitioner could not sue the referee. A petition to the court was the proper mode of proceeding. (*Merritt's Case*, 5 *Paige*, 125; 16 *Wend.*, 405, 421; *Darrin v. Hatfield*, *Seld. Notes of Ct. of Appeals*, Dec., 1852, 36; *Read v. Fite*, 8 *Humph.*, 328, 330.)

III. A purchaser is entitled to a good title. (*McGown v. Wilkins*, 1 *Paige*, 120; *Marlow v. Smith*, 2 *P. Wms.*, 198, 201; *Ogilvie v. Foljambe*, 3 *Mer.*, 53, 64; *McDonald v. Hanson*, 12 *Ves.*, 277; *Costar v. Clarke*, 2 *Edw. Ch.*, 428.) He will not be compelled to take a doubtful title, or one merely equitable. (*McGown v. Wilkins*, 1 *Paige*, 120; *Morris v. Mowatt*, 2 *Ib.*, 586, 590; *Jervoise v. Duke of Northumberland*, 1 *Jac. & W.*, 570; *Fletcher v. Button*, 4 *Comst.*, 396; *Jackson v. Edwards*, 22 *Wend.*, 498, 510; *Creigh v. Shatto*, 9 *Watts & S.*, 83, 84; *Cook v. Farmer*, 11 *Abbotts' Pr.*, 40, 41; *Pyrke v. Waddingham*, 17 *Eng. L. and Eq.*, 534; S. C., 10 *Hare*, 1.) Or one which may involve a lawsuit, or a difficulty of getting possession. (*McGown v. Wilkins*, 1 *Paige*, 120.) Or which depends upon a conveyance under a power of attorney. (*Sugd. Vend. and Pur.*, 10 ed., 437, pl. 13; *Mitchel v. Neal*, 2 *Ves. Sen.*, 679; *Richards v. Benton*, *Esp.*, 28.) Or which is subject to a life estate in an undivided part. (*Spring v. Sandford*, 7 *Paige*, 550, 555; *Darrin v. Hatfield*, *supra*; *Bates v. Delavan*, 5 *Paige*, 299, 307, 308.) Where an infant in a partition-suit was not properly brought in as a party, although after the master's sale,

having become of age, he offered to convey his share and interest to the purchaser, it was decided that the purchaser should be discharged from the purchase. (*Kohler v. Kohler*, 2 *Edw.*, 69.)

IV. A purchaser at a judicial sale, who is aware of irregularities in the proceedings, will take subject to the rights and equities affected by such irregularities, and will not be entitled to the privileges of a *bona-fide* holder. In such a case, therefore, he will not be compelled to complete his purchase, and he will not have a title that is unimpeachable or free from doubt. (*Simonds v. Catlin*, 2 *Cai.*, 61; *Case v. Redfield*, 7 *Wend.*, 200, 400; *Curtis v. Hitchcock*, 10 *Paige*, 399, 409; *Colvin v. Luther*, 9 *Cow.*, 61, 64; *Jackson v. Anderson*, 4 *Wend.*, 474; *Swan v. Saddlemire*, 8 *Wend.*, 676; *Wormley v. Wormley*, 8 *Wheat.*, 422, 450; *Swayze v. Burke*, 12 *Pet.*, 11, 25; *Williams v. Hollingsworth*, 1 *Strobh. Eq.*, 103; *Sand's Heirs v. Ruddle*, 2 *T. B. Monr.*, 139; *Hoffman v. Stedhecker*, 7 *Watt*, 89; *Givan v. Doe*, 5 *Black.*, 260; *Enloe v. Miles*, 12 *Sm. & Mar.*, 147.) And he will be discharged from his purchase, if there was error in the decree, although the parties are proceeding to rectify it. (*Lechmere v. Brasier*, 2 *Jac. & W.*, 287.)

V. Samuel Mitchell was a necessary party, and was named in the complaint as one of the defendants; but the summons was not served upon him, either personally or by publication; nor was there a voluntary appearance by him. It is now asserted that he was an infant and a lunatic, or idiot, and a non-resident. There was no averment and no proof of either of these facts. The only attempt to give any proof, was the petition of Mounts, but which contains no statement that Mitchell was a non-resident; and does not state how the petitioner became his guardian, or by what authority he was appointed; nor whether he was guardian of his person or his estate, nor what powers or authority he possessed under such appointment. The petition was not verified so as to entitle it to be read. It is not specified at what place the affidavit was taken. (2 *Rev. Stat.*, 396, § 26, subd. 1.) The clerk does not certify the genuineness of the signature of the judge, nor the existence of the court. (*Id.*, subd. 2.) These particulars required by the statute cannot be dispensed with by the court, especially in a case where, if the person swore falsely, they could not be prosecuted



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for perjury; and there is, at the best, little protection to the parties. (*Titus v. Relyea*, 16 *How. Pr.*, 371; cited in *Cook v. Farmer*, 11 *Abbotts' Pr.*, 40.)

VI. If it had been duly proved that Mitchell was a non-resident, an infant, and an idiot, the court had no jurisdiction of him. 1. This was an action under the Code. The only mode in which a suit can be commenced against a person under the Code, so as to give the court jurisdiction, is by service of a summons on him personally (*Code*, §§ 127, 134), or by publication (*Ib.*, § 135), or by his voluntary appearance (*Ib.*, § 139). 2. If it had been a proceeding under the Revised Statutes by petition, notice of the petition must have been served, before presenting the petition to the court. (2 *Rev. Stat.*, 317, § 2; *Ib.*, 319, §§ 12, 13; *Ib.*, 320, §§ 79, 80.) Guardians must also have been appointed for infants, and bonds given by them. (2 *Rev. Stat.*, 307, §§ 2-4.) The court has no power to authorize the sale of lands of an infant or others, except as given by statute. (*Rogers v. Dill*, 6 *Hill*, 415; *In re Pettit*, 2 *Paige*, 174, 596, *Bloom v. Burdick*, 1 *Hill*, 130, 138-142.) Under the Code, there must be service of summons, or appearance,—under the Revised Statutes, notice of petition,—to give jurisdiction.

The power to appoint guardians in suits against infants, does not supersede the necessity of service of a summons personally, or by publication, or of a voluntary appearance, to give the court jurisdiction. In all cases, it must be commenced in one of these modes. Before the Code, such service or advertisement was necessary. (1 *Barb. Ch.*, 51, 52; *Ontario Bank v. Strong*, 2 *Paige*, 301; *Minor v. Botts*, 7 *Paige*, 596; *Grant v. Van Schoonhoven*, 9 *Paige*, 255. And see *Pollard v. Groom*, 2 *J. J. Marsh*, 487; *Walker v. Bank of Mobile*, 6 *Ala.*, 452, 459.) A man alleged to be insane has a right to be heard on the question whether he is insane. (*Chase v. Hathaway*, 14 *Mass.*, 222.) So one alleged to be a minor, ought to receive notice.

The Code gives no jurisdiction over any persons where there is not service, advertisement, or voluntary appearance. (*Heller v. Heller*, 6 *How. Pr.*, 194; 1 *Code R.*, 309; *Cook v. Farmer*, 11 *Abbotts' Pr.*, 40.)

VII. These objections cannot be obviated by amendment. 1. This court, on this appeal, has no power to make amendment, as none was applied for at special term. The court has

no jurisdiction in these proceedings, except to determine the appeal. An application to amend can be made to the special term alone. 2. The purchaser cannot be required to wait till such amendments are made, and a new judgment obtained. (*Kohler v. Kohler*, 2 *Edw.*, 69; *Lechmere v. Basier*, 2 *Jac. & W.*, 287.) 3. The court has not power to bind infants or adults to a sale made before they were parties; and still less to decree, now (before they are parties), that they shall be bound.

VIII. The purchaser was entitled to his costs and expenses, including counsel fees, which should come out of the fund, as all parties to the suit were actors on the sale, and the sale was, therefore, the act of all. (*Kohler v. Kohler*, 2 *Edw.*, 69; *Pleasants v. Roberts*, 2 *Moll.*, 507.)

Charles O'Connor, for the appellants, in reply.—I. Mitchell was an infant at the commencement of the action; but he came of age within a year or two afterwards, and thereafter an attorney and counsellor of the court appeared for him. This is the appearance of an adult by attorney and counsel, and it disposes of the infancy-point. (*Code*, § 139; 1 *Barb. Ch.*, 149, 334.)

II. The objection that Mitchell was an idiot, is, if possible, less important. 1. By an ancient rule of the common law, the sovereign represents all idiot subjects or citizens; and this branch of the administration having been devolved upon the chancellor at an early day, now reposes in this judicial tribunal as the high court of equity of this State. (*Shelf. on Lun.*, 12, 16; 17 *Edw. II.*, ch. 9, § 10; *Oxenden v. Compton*, 2 *Ves.*, 69, 70; *Coke (on Magna Charta)*, 2 *Inst.*, 14; 4 *Com. Dig.*, tit. *Idiot*, C.; *Chitty's Prer. of Crown*, 158; 2 *Rev. Stat.*, 173, § 36; *Judiciary Act, Laws of 1847*, 323, § 16; 2 *Rev. Stat.*, 52, § 1.) 2. It necessarily results that in a suit in equity concerning the lands of an idiot, he need not even be named as a party. The court represents him; and so held Chancellor Kent, the father of equity practice in this State, nearly fifty years ago. (*Exr. of Brasher v. Van Cortlandt*, 2 *Johns. Ch.*, 242; *S. C.*, *Ib.*, 400.) 3. The committee acting for an idiot or lunatic are merely agents of the court, acting under its direction. Their action is not indispensable. The court acts *ex officio* as a protector in respect to idiots or lunatics, as it does in respect to infants, on the information of whomsoever the court in its discretion thinks

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fit to hear. (*Shelf. on Lun.*, 424; *Macp. on. Inf.*, 400; *In re Perkins*, 2 *Johns. Ch.*, 124.) The regular mode of defending a suit brought against an idiot is by guardian *ad litem*. Even where there is a committee, this is the regular course. The court will not always appoint the committee, if there be one, to defend as guardian *ad litem*; and when there is no committee, the court may appoint a guardian *ad litem*. (*Sherwood v. Sanderson*, 19 *Ves.*, 283; *Wilson v. Grace*, 14 *Id.*, 171; *Howlett v. Wilbraham*, 5 *Mad.*, 423; *Anonymous*, 3 *P. Wms.*, 111; *Smith v. Palmer*, 3 *Beav.*, 10; *Shuttleworth v. Shuttleworth*, 2 *Hare*, 147.)

III. It cannot be objected that the court had no power to act as protector to this idiot, and to represent him without the intervention of a committee. 1. The statute does not prescribe this as an indispensable formality. 2. The practice of requiring a commission of idiocy or lunacy, seems to have sprung from jealousy of the prerogative. (*In re Barnsley*, 3 *Atk.*, 171, 174.) And the sole object was to require full proof of idiocy before depriving the subject of his liberty or of control over his property. No other question but—Idiot or not, was determinable in that way. And it seems to be very doubtful whether that proceeding is applicable to a foreign idiot, not owing allegiance to the State or being personally within the State. As to such foreign idiots, the court will act on other proof than an inquisition. (*Exp. Otto Lewis*, 1 *Ves. Sen.*, 298; *S. C.*, *Ambler*, 80; *Exp. Gillam*, 2 *Ves. Jr.*, 587; *Shelf. on Lun.*, 426; *In re Elias*, 7 *Eng. L. and Eq.*, 5.) It has been much doubted whether a commission was even proper in such a case. (*Exp. Southcote*, 1 *Amb.*, 109, 112; *S. C.*, 2 *Ves. Sen.*, 400; *In re Perkins*, 2 *Johns. Ch.*, 124; *In re Houstoun*, 1 *Russ.*, 312; *In re Bariatinski*, 1 *Phillips' Ch.*, 377. Especially see *Stock's Non Compos Mentis*, 94, cited by *Ch. Walworth*, 9 *Paige*, 417.) 3. If Mitchell was indeed and in fact an idiot, surely neither he nor his heirs can ever assert that fact, and, at the same time, complain that the court acted as that fact required, *i. e.*, appointed a guardian *ad litem*.

IV. The court had jurisdiction of the subject-matter, *i. e.*, a partition of lands lying within its jurisdiction. (*Monroe v. Douglas*, 4 *Sandf. Ch.*, 180, 184.) The court is a court of record of the highest grade, having general jurisdiction, and its cogni-

zance of the parties cannot be impeached by evidence contravening the record. (*Chemung Bank v. Judson*, 4 *Seld.*, 260, 261; *Croghan v. Livingston*, 17 *N. Y.*, 220; *S. C.*, 6 *Abbotts' Pr.*, 352.) The record shows jurisdiction in this, that there is a guardian *ad litem*, or an attorney appearing for the defendant, as the case may require; and *quacunque via data* the judgment is valid. This is not reversible on appeal. (*Code*, § 11.) A motion to set aside the proceedings could not be sustained. (*Dunn v. Dunn*, 4 *Paige*, 425.) An original action would not lie to vacate the judgment. (*Monroe v. Douglas*, 4 *Sandf. Ch.*, 191, 192.)

V. The defendant, Mitchell, could not have appeared otherwise than through the agency of a guardian *ad litem* appointed by the court *proprio motu*, or on the application of the plaintiff or of some friend. He has so appeared, a protracted and hostile litigation has ensued, and, if the proceedings are all void merely because a summons which he could not understand was not handed to the idiot, or because an advertisement which he could not read was not published in a paper one thousand miles from his dwelling-place—forms the most idle and useless in fact, are more important in law than has generally been supposed.

Marshall S. Bidwell, for the respondent, in reply.—I. The case of *Brasher v. Van Cortlandt* (1 *Johns. Ch.*, 245, 401), cited by Mr. O'Connor, was a suit in equity by creditors of a lunatic against his committee to obtain payment of a debt. The chancellor held that the court could order payment without suit, under the statute (1 *R. L.*, 147); and that, in that case, all the provisions of that statute were complied with in substance, so that, without the form and expense of a petition, &c., the court had power to make the same orders as if a petition had been presented. (It has since been held that a suit in such a case is not only unnecessary, but improper. *In re Heller*, 3 *Paige*, 199.)

II. The decision was founded entirely on the statute, and the fact that there was a committee duly appointed in this State. Here there was no such committee, and even if there was sufficient evidence of the appointment of Mounts as guardian, and that could be considered equivalent to an appointment of him as committee, yet the court could not act upon it. (*In re Perkins*, 2 *Johns. Ch.*, 124; *In re Petit*, 2 *Paige*, 174.)

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The court has no power to authorize a sale of the real estate of an infant or lunatic, except in cases prescribed by statute, viz., for debts or maintenance. (*In re Petit*, 2 *Paige*, 596; *Rogers v. Dill*, 6 *Hill*, 416.) In partition suits, its power to authorize a sale is not derived from its general jurisdiction over their estates, but from statute; and in such cases it has no other power over the shares of infants, lunatics, &c., than of adults.

III. The plaintiff cannot set up that Mitchell was an adult.

He has proceeded and taken judgment against him as an infant idiot, and he is not at liberty to deny his infancy or idiocy.

IV. But Mr. Richardson is not so estopped, and may say that if the proceedings would be binding on Mitchell if he were an infant idiot, yet the plaintiff has not proved that fact. If the judgment were not binding on him, as an infant idiot, there is an end of the case, because he may have been an infant idiot; but if it were in such a case binding on him, then the question is, *first*, was it proved that he was an infant idiot? *secondly*, if it were, would he (if not an idiot lunatic) be bound by the judgment?

The paper purporting to be a copy of the order of the court in Ohio, appointing Mounts guardian of Mitchell, was not proved in the manner prescribed by law; but if it were duly proved, it would not, in this court, be evidence of infancy or idiocy. (*Morrill v. Dickey*, 1 *Johns. Ch.*, 156; *In re Perkins*, 2 *Id.*, 124; *Williams v. Storrs*, 6 *Id.*, 353, 357; *In re Petit*, 2 *Paige*, 174; *Chapman v. Fish*, 6 *Hill*, 554; *Stacy v. Thrasher*, 6 *How. (U. S.)* 58; 2 *Kent's Com.*, 227 (n. b.); 432 and (n. c.); *Story's Conf. of L.*, 414.)

V. The rule laid down in *Denton v. Noyes* (6 *Johns.*, 298), that the party is bound, though the attorney had no authority, does not govern the case. 1. It has no application here, because the answer purported to be the answer of Mounts, not of Mitchell. 2. On the face of it, and of the papers on which it was founded, the plaintiff was expressly notified that Mr. Judah had no authority from Mr. Mitchell to appear as his attorney.

3. Mr. Judah did not, even in the amended answer, appear as Mitchell's attorney, but merely as his guardian *ad litem*.

4. If Mitchell were insane, Mr. Judah could not have appeared for him as attorney (*Elliott v. Elliott*, 1 *Carter (Ind.)*, 119.)

Moreover, it has been overruled, and now exploded. (*Robson a. Eaton*, 1 *T. R.*, 62; *Wheatley a. Bastow*, 7 *De G. Mac. & G.*, 261; *S. C.*, 1 *Jurist (N. S.)*, 1124; *Depeu a. Keeling*, 4 *Car. & P.*, 102; *Bayley a. Buckland*, 1 *Exchequer (Welsby Hurls. & G. R.)*; *S. C.*, 5 *Dowl. & Lown.*, 115; *D. D. Hammek a. Fillis*, 2 *Chitty*, 170; *D. D. Shepherd a. Roe*, *Id.*, 171; *Allen a. Stone*, 10 *Barb.*, 547; *People a. Mayor of N. Y.*, *Taylor and Brennan*, 11 *Abbotts' Pr.*, 71, 72; *Hess a. Cole*, 3 *Zab.*, 116; *Frye a. Calhoun Co.*, 14 *Ill.*, 132.)

VI. There is no difficulty in proceeding regularly against an infant lunatic who is a non-resident. 1. A committee may be appointed for him. (*In re Perkins*, 2 *Johns. Ch.*, 124; *In re Petit*, 2 *Paige*, 174.) 2. In a partition-suit, jurisdiction over him may be obtained by a publication under the Code. That will give him an opportunity to come in and show that he is not a lunatic. (*Chase a. Hathaway*, 14 *Mass.*, 222.) The law has prescribed this mode of acquiring jurisdiction, and the court cannot disregard it. And they surely will not do it, where the inheritance is to be bound; they will not, in such a case, deprive a man of any safeguards which the law has thrown around him for his protection. (*Titus a. Relyea*, 16 *How. Pr.*, 371, cited in *Cook a. Farmer*, 11 *Abbotts' Pr.*, 41.)

In the case of *Monroe a. Douglas* (4 *Sandf. Ch.*, 184), the vice-chancellor says, that the "party cannot be permitted to show that he never had any notice of the suit, otherwise than by showing that the notice required by the local law was not given."

In this case, the local law required that notice should be given by service of the summons (either personally or by publication), or that there should be a voluntary appearance.

Accordingly, Mr. Mitchell would be at liberty to show that he had not received such notice; and in fact he could show it. If he did, the judgment as to him would be void.

By THE COURT.—HOGEBROOM, J.—In this case the purchaser asked to be relieved from his purchase of premises bought at a sale in partition, and the case comes up on the appeal of the plaintiff, from the order of the special term releasing him from his bid.

The principal defect or irregularity consists in the alleged

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want of jurisdiction of the court over the person of Samuel Mitchell, a supposed infant and idiot, or lunatic, by reason of which he is not bound by the proceedings and decree in this action.

The facts in regard to this party, on which this question arises are these.

This is a suit in partition respecting lands in the city of New York, and of which the court has therefore general jurisdiction, in which a large number of parties are named as defendants, and among others Samuel Mitchell. As to many of these defendants, it is undisputed that the court acquired jurisdiction of them either by the service of process, or by their voluntary appearance. There was therefore a suit properly commenced, in which Mitchell, among others, is named as defendant. He was not served with process. He did not in person, or by his own voluntary act, put in an appearance; nor was any notice, or other paper served upon him in the suit; nor was publication made or ordered as to him, so far as appears from the papers in the case.

Mitchell was named in the complaint as entitled to an undivided twentieth part of the premises, but (as was usual) neither his residence, age, or mental condition was stated in the complaint.

Civil actions shall be commenced by the service of a summons. (*Code*, § 127.) A summons must be served (except where service is by publication) by delivering a copy thereof to the defendant personally; and if of unsound mind, and having a committee (§ 134), then also to such committee. A voluntary appearance of a defendant is also equivalent to personal service of the summons upon him. (§ 139.) None of these things have been literally done, and this defendant, if an idiot, or a lunatic, is incapable of making or directing a voluntary appearance.

The question remains whether any thing else has been done legally equivalent to the service of process, or sufficient to give the court jurisdiction of the person of the defendant Mitchell.

The action appears to have been commenced, at least, the complaint appears to have been verified, in October, 1854. In December, 1854, William J. Mounts, describing himself as the guardian of Samuel Mitchell, an infant idiot, of about the age

of twenty years, subscribed a petition to this court, setting forth the commencement of this action; declaring that the "petitioner's said ward is an infant lunatic as above set forth," and praying that Mr. Judah might be the guardian of the petitioner's ward in the defence of said suit.

This petition was verified on the 19th of December, 1854, and states that the petitioner appeared before John C. Dunlevy, judge of the Probate Court within and for said county, and being sworn, stated that the same was true of his own knowledge, except as to matters stated on information and belief, and as to them that he believed it to be true. It is objected that the act of Congress requires the place, where the affidavit was taken, to be stated, and that this verification is defective in that particular. But it is headed, "State of Ohio, Warren county, ss.," and this, taken in connection with the certificate of the judge, which admits of the construction that the petitioner appeared before him within said county, and with the legal presumption in favor of the probable knowledge and compliance by the judge with the formalities of law, is sufficient, I think, to overcome that objection. The same considerations, perhaps, should induce us to overrule the objection, that the clerk of the Probate Court has not certified to the genuineness of the signature of the judge. He certifies that "John C. Dunlevy, before whom the above affidavit was taken, is sole judge of the Probate Court in and for said county;" and the judge again certifies to the authenticity and regularity of the clerk's certificate. I am inclined to think this is sufficient; but if it were not so, I think the proper course would be, not to discharge for that reason the purchaser from his bid, but to allow a proper certificate, both on the part of the judge and the clerk, to be procured and filed *nunc pro tunc*, and only to discharge the purchaser on failure to procure and file the same within a specified time, to be fixed by this court.

The petition was presented to Justice Roosevelt at a special term, on the 4th of January, 1855, and an order entered thereon, that Mr. Judah be appointed guardian *ad litem* of the above-named defendant, with others. He was also ordered to file a bond in the penal sum of \$250, as such guardian, which was done; and he thereafter answered as such guardian, and conducted the subsequent proceedings for this defendant. In the

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final decree for sale, Mr. Judah is recited as appearing as counsel for all the defendants, and for the guardian *ad litem* of all the infant defendants. There appears to be no proof in the case as to the infancy and idiocy or lunacy of Mitchell, beyond what is contained in the petition and order above mentioned, except that annexed to the papers used in opposition to the motion in this case, for the discharge of the purchaser, is what purports to be a copy of an appointment of William J. Mounts, as guardian for Samuel Mitchell, an idiotic person aged about twenty years, of Warren county, Ohio. This appointment was made by the Probate Court of Warren county, Ohio, on the 13th day of October, 1854. The question, therefore, seems to be, whether on the petition of a guardian, thus made and presented, this court had authority, without service of process or voluntary appearance, to appoint a guardian of Samuel Mitchell, and conclude him by the proceedings in this suit. On the one hand, it is contended that the court possesses this power by virtue of its inherent authority over the persons and estates of infants, lunatics, and idiots, and may exert it upon its own motion, without suggestion from any quarter; or may take such measures to enlighten itself, as it may think proper, in regard to the infancy or lunacy of any party, and the proper person to be appointed committee or guardian *ad litem* for such person; and having exercised this power in the present case, in a manner satisfactory to itself, its action is conclusive and the proceedings regular. On the other hand, it is contended that service of process, or voluntary appearance, is the only mode of bringing any party into court; that the Revised Statutes expressly require notice to be served upon the infant; and that it is only after such service made upon the proper person and in the regular way, and upon the petition of the infant, or his committee or guardian appointed in this State, that jurisdiction can be acquired of the infant and lunatic, or a guardian *ad litem*, appointed for him; and that in the event of this not being done, the proceedings are *coram not judice*, and void.

The important, if not the only serious question in the case is, whether the defendant Mitchell is or is not bound by the proceedings in the suit. And on the part of the purchaser it is said in the first place, that the provisions of the Revised Statutes have not been followed, and therefore the infant is not bound.

Those provisions (2 *Rev. Stat.*, 317) relate to proceedings at law for the partition of lands, but are in substance probably applicable also to proceedings in equity (*Ib.*, 329), if they are not superseded by the provisions of the Code or the general practice of the courts in relation to the mode of commencing suits and appointing guardians *ad litem*. Section 2 provides for the appointment of guardians for minors (preliminary to the service of the petition for partition), as well non-resident as resident, by a previous service of a notice of ten days on the resident minors. Section 12 provides that after such appointment, the service of the petition and notice of presentation shall be made on non-resident parties, minors, or of full age, by a three months' publication in the State paper, and in a newspaper printed in the county where the premises are situated.

But the proceedings are in their nature inappropriate to an action for partition under the Code. And, therefore, they are not required to be strictly followed (*Code*, § 448), although it has been held in the Superior Court of New York, that in a suit under the Code, a guardian in partition cases may be appointed previous to the commencement of the action. (*Althaus v. Radde*, 3 *Bosw.*, 410.) At all events, it cannot be doubted that an appointment, pursuant to the provisions of the Code, would be legal and binding.

By section 115 of the Code, where an infant is a party, he must appear by guardian. In this case the infant is a party-defendant. He is a party to the suit, when he is named as a party in the summons and complaint, and is shown thereby to have an interest in the subject-matter of the action, and where the suit is actually commenced against some of the persons named as the defendants therein. And this is especially so, where he appears to have a joint interest, or an interest in common with others. In such event he becomes a party to the suit as well before as after the service of process upon him. Therefore if an infant, he is not obliged to wait until the actual service of process upon him, before he procures the appointment of a guardian *ad litem*. (*Varian v. Stevens*, 2 *Duer*, 635.) So also he may voluntarily appear and have the proceedings dismissed if irregular or void. (*Lyle v. Smith*, 13 *How. Pr.*, 104.) So also he may on his own motion procure the appointment of a guardian *ad litem*, serve an answer to the merits of the action,

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and compel the plaintiff to receive it. (Wellington *a. Claason*, 9 *Abbotts' Pr.*, 17; S. C., 18 *How. Pr.*, 10.)

Mitchell then having become a party-defendant to a suit in partition, and being an infant over the age of fourteen years, and an idiot, or a lunatic, a guardian was to be appointed for him. (*Code*, § 116.) Properly, if the infant had been of sound mind, the guardian could and should have been appointed upon the petition of the infant himself. (§ 116.) But in the present case this was of course impracticable. A petition from a lunatic would have been useless and nonsensical; and strictly speaking the Code does not provide for the case of a lunatic infant over fourteen years of age. It must be regulated therefore by the established practice of the court, and by sound judicial discretion. In analogy to the mode of procedure required where the infant is under fourteen years of age, and founded upon the want of discretion supposed to attach to infants of such tender age, perhaps it would be wise to exact notice to the person with whom the infant resides, where the application for the appointment of a guardian is by a relative or friend of the infant, and he has no guardian. But in this case he has a guardian (extra-territorial to be sure). And it is fair to presume that the lunatic resides with, or is under the immediate charge and control of, such guardian; and if proof is necessary upon this subject,—in the absence of any evidence to the contrary,—I think it may be supplied hereafter *nunc pro tunc* by way of amendment. (*Code*, § 173; *Croghan a. Livingston*, 17 *N. Y.*, 218; S. C., 7 *Abbotts' Pr.*, 352.)

If the Revised Statutes are to govern, I perceive no section which is directly applicable to the case in hand, unless it be section 2, of the title in regard to the partition of lands before quoted (2 *Rev. Stat.*, 317, § 2), and that only requires notice to the resident minors of intention to apply for the appointment of guardians, both for the resident and non-resident minors.

If we refer to the mode of commencing a suit against a person, judicially declared to be of unsound mind, we find that it is to be commenced by service of the summons upon the defendant and upon the committee (or, as he appears to be termed in Ohio, the guardian). (*Code*, § 134.) This is essential, doubtless, to enable the plaintiff to obtain a regular and compulsory judgment where the adverse party does not appear. But I can-

not suppose it to be indispensable where such adverse party does appear, in the only mode in which he can (in the case of a lunatic) possibly appear, that is through the medium and intervention of a third party. In such case, if the committee or guardian present the petition to the court for a guardian *ad litem*, it comes from the most proper person who can possibly represent the party, and in the appropriate and commendable exercise of his functions as such committee or guardian; and if, in addition, the petition itself discloses the fact that a suit in partition has been commenced against such infant and lunatic, and this fact is not disputed, I cannot but think that the court obtains jurisdiction of the person of the lunatic and infant defendant; so far at least as to conclude him in the suit in regard to the lands lying in the State of New York.

The practice pursued in this case to effect an appearance of the lunatic, seems to be in accordance with the usual practice of courts of equity, where a lunatic is made a defendant in an action (1 *Barb. Ch. Pr.*, 86, and cases and books there cited), and must, I think, be conclusive upon the defendant accordingly. As this practice is supposed to be ample to protect the rights of the lunatic, the additional disability or quality (if I may so term it) of infancy, ought not perhaps to be regarded as imposing additional restrictions or difficulties in the way of procuring his appearance in the action; and especially so, as none of the requirements of the Code in regard to the appointment of a guardian *ad litem*, seem directly adapted to the case of an infant idiot or lunatic.

Further, the Code (§ 139) provides that the "voluntary appearance of a defendant is equivalent to personal service of the summons upon him." The spirit of this enactment has been held to be complied with, by the voluntary appearance and procurement of a guardian *ad litem* by an infant defendant over the age of fourteen years, without the actual service of process upon him. (*Varian v. Stevens*, 2 *Duer*, 635; approved in *Wellington v. Claason*, 9 *Abbotts' Pr.*, 175; *S. C.*, 18 *How. Pr.*, 10.) If this distinction is correct, and it seems to me to be so, I am unable to see why it should not be extended to the voluntary appearance of an infant lunatic defendant, over the age of fourteen years, without the actual service of process upon him, provided the requirements of the Code, so far as they are appli-

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cable, and in the absence of any express requirements, the established practice of a court of equity, are observed in effecting his appearance, and procuring the appointment of a guardian *ad litem*.

I am of opinion, therefore, that none of the objections of the purchaser to the validity of the partition proceedings, as against the defendant Mitchell, are well taken, to that degree that they are incapable of being remedied by amendment. I have not examined any other objections than those relating to the defendant Mitchell, because none other were examined at the special term, and because it seemed to be taken for granted, that unless the purchaser could prevail on these, the others would be unavailable.

I conclude that the order of the special term should be reversed, and the purchaser be required to complete his purchase, provided the plaintiff, within forty days after the entry and notice of the order as finally settled upon this decision, shall procure and file with the clerk of this court, where the other papers in this cause are filed, an amendment of the petition of William J. Mounts, to the effect that his infant or lunatic ward was, at the time of verifying his original petition, residing with him, or under his charge or custody; and an amendment of the jurat or certificate of the judge attached thereto, stating the place where the said petition was verified and affidavit was taken; and an amendment of the certificate of the clerk, so that it shall, in addition to its present contents, certify to the existence of the court and the genuineness of the signature of the judge. Such amendment when made, to be deemed made *nunc pro tunc*; and if not made and filed as aforesaid, then that the order of the special term (except so far as it allows more than \$10 costs of motion, in which particular, it should, in any event, be reversed) be affirmed.

In either event,—of affirmance or reversal,—the petition is entitled to \$10 costs of the special term, and \$10 costs of appeal.

SUTHERLAND, J., concurred.

BONNEY, J., dissented.

DE WITT a. CHANDLER.

Supreme Court, First District; General Term, November, 1860.

LEGACY.—VOLUNTARY ASSOCIATION.—ACTION IN THE NAME OF
PRESIDENT.—DISMISSAL OF COMPLAINT.

In, and previous to, May, 1849, there existed in New York three unincorporated associations of similar objects, viz. : The American Protestant Society, whose object was to diffuse through the United States the principles of the Protestant religion ; The Foreign Evangelical Society, whose object was to promote the moral and religious welfare of the inhabitants of foreign Christian countries ; and The Christian Alliance, whose object was to unite Christians of all denominations in promoting religious freedom and knowledge in papal countries. These associations were simultaneously dissolved, and the members of them associated themselves as the American and Foreign Christian Union, whose object was declared to be to diffuse religious liberty and pure Christianity, both at home and abroad, where a corrupt Christianity exists. The defendants' testator who died shortly before the union of these societies, bequeathed a legacy to be paid in six years from his decease, to the person who at such time should act as treasurer of the American Protestant Society, the first above named.

Held, 1. That the new society sufficiently represented the other to be entitled to the legacy.

2. That an action to recover it must be brought in the name of the treasurer of the new society, he being the real party in interest.

The president of such an association may, under the acts of 1849 and 1851, maintain actions on behalf of the association ; and if the legacy had been to the association instead of the treasurer, the president might recover thereon.

The objection that such an action was brought in the name of the president instead of by the treasurer, need not be taken by demurrer or answer, but may be taken on the trial on the ground that the facts do not constitute a cause of action.

Although the complaint in such an action, among other relief, demands the appointment of a trustee to receive the legacy if such appointment should be adjudged necessary, the court will not deem that a proper subject to be passed on in a suit framed for the main purpose of obtaining payment of the legacy to the existing treasurer.

In such case the order dismissing the complaint should be without prejudice to a new action.

Appeal from an order dismissing the complaint.

On the 30th day of November, 1847, Peter Chandler made

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and executed his last will and testament, and among numerous bequests made the following :

"I give and bequeath to my executors the sum of three thousand dollars, in trust, to pay over the same in six years from my decease, to the person who, when the same is payable, shall act as the treasurer of the American Protestant Society, reorganized in the city of New York, under its present name in the year 1844, to be applied to the charitable uses and purposes of said society, and under its directions."

The testator died on the 1st day of January, 1848. The American Protestant Society, from the date of said will, until May 10, 1849, was a voluntary and unincorporated association of persons in the city of New York, organized under a constitution which, among other things, declared the object and purpose of said association, as follows :

ARTICLE 2d.

"The object of this society is to diffuse throughout the United States the principles of the Protestant religion, for the purpose of enlightening the minds both of Protestants and of Romanists respecting the doctrines and duties revealed in the word of God, and to diffuse correct information concerning the distinctions between Protestantism and Romanism."

On the 10th day of May, 1849, said association ceased to exist, and ceased to have any organization whatever, or any officers.

There also existed in the city of New York on the 10th day of May, 1849, a certain other voluntary and unincorporated association, called "The Foreign Evangelical Society of the United States," having a constitution which declared the object of such association as follows :

ARTICLE 2d.

"The object of this institution shall be, by means of preaching, schools, useful books, and other lawful instrumentalities, to promote the moral and religious welfare of our fellow-men in foreign Christian countries which stand in need of our aid."

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This society also ceased to exist, or to have any officers or organization on said 10th day of May, 1849.

Another voluntary and unincorporated association also existed on said 10th day of May, 1849, in the city of New York, called by the name of "The Christian Alliance."

The object of the last association "was to unite Christians of all denominations, in promoting religious freedom, and to diffuse useful religious knowledge, especially the word of God, among the nations of Italy and other papal countries."

On the 10th day of May, 1849, a new association, voluntary and unincorporated, was formed in the city of New York by the associates of the aforesaid three associations, and consisted of seven or more associates, and adopted a name, "The American and Foreign Christian Union," and a constitution, which, among other matters, declares the object of such new association as follows:

ARTICLE 2d.

"The object of the society shall be by missions, colportage, the press, and other appropriate agencies, to diffuse and promote the principles of religious liberty, and a pure and evangelical Christianity, both at home and abroad, wherever a corrupt Christianity exists."

The plaintiff in this action, as the president of the latter association, brought this action, under the Law of 1849, as amended in 1851 (see *Laws of 1849*, ch. 258; *Ib.* 1851, ch. 455),—authorizing suits by associations to be maintained in the name of officers,—against the defendants as the executors of said testator, to enforce the payment of the legacy which the executors, on demand, had refused to pay. The cause was referred to H. W. Robinson, Esq., as referee, who dismissed the complaint with costs after a hearing of the parties.

The referee who tried the cause found the foregoing facts substantially, and the following conclusions of law:

1. That no law authorizes an action in the name of the president of an association, unincorporated and voluntary, except when such action might be maintained in the name of the associates.

2. That the American and Foreign Christian Union has no

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right to maintain the action, either in its own name, or the name of the president.

3. The bequest in question was not a legacy to the American Protestant Society, but was made for the charitable uses and purposes of said society.

4. The American Protestant Society, being a voluntary and unincorporated society at the death of the testator, was legally incompetent to take or hold property as trustee.

5. That the trust contained in the bequest in question, is not the subject of a voluntary transfer. And the American Protestant Society had no power over or interest in its execution, which it could assign or transmit to "The American and Foreign Christian Union," or its president.

6. That the American and Foreign Christian Union had not, nor has its president, any other or further interest in the enforcement of the bequest than any citizen at large, and such general interest does not furnish any ground of action.

7. The objection is apparent in the face of the complaint, that a cause of action is not stated, and, therefore, it was not necessary to demur.

The plaintiff duly excepted to the report of the referee, and to his conclusions of law, and the report was filed and judgment entered thereon in favor of the defendants, dismissing the complaint, and for \$112.90, the costs of the action, on the 17th day of June, 1858. The plaintiff duly appealed therefrom to the general term.

J. W. Edmonds, for the appellant.—I. This action is properly brought in the name of the president of the society. The Act (ch. 258, 389) of 1849 authorizes any joint-stock company or association thus to prosecute. The Act (ch. 455, 838) of 1851 extends the provisions of that act to "any company or association composed of not less than seven persons, who are owners of, or have any interest in, any property, right of action, or demand," &c. (*Austin v. Searing*, 16 *N. Y.*, 116; *Tibbetts v. Blood*, 21 *Barb.*, 650.)

II. The referee erred in ruling that the bequest can be sustained against the trustee only by the attorney-general. 1. That is on the principle that plaintiffs are not *cestuis que trust*. That

is begging the whole question involved in the action, and deciding the merits on a question of parties; and that is never done, when a valid decree on the subject-matter can be made between the parties in court, in the pending action. (*Story's Eq. Pl.*, § 228.) 2. The case cited, *Female Association a. Beekman* (21 *Barb.*, 565), does not establish this principle. It merely decides that, in a case of a charity, where there is no one who has more than a mere possibility, the attorney-general may enforce it. 3. Besides, even if it were so, that is no reason why the complaint should have been dismissed. The cause might stand over to bring in the attorney-general, the objection being made only at the hearing. (*Story's Eq. Pl.*, §§ 236, 541.) If dismissed, it ought to have been without prejudice to a new suit. 4. But these plaintiffs had more than a mere possibility. If they have not the beneficial interest, no one has; and it is only where all the parties interested are parties to the abuse, that the proceeding must be by the attorney-general. (*Bromley a. Smith*, 1 *Sim.*, 8.) 5. It is too late to make an objection as to parties. It ought to have been made by demurrer, and not being so made, it is waived. (*Code*, §§ 144, 147; *Zabriskie a. Smith*, 3 *Kern.*, 336.)

III. These plaintiffs succeed to all the rights of the legatees, and can enforce the bequest. 1. The society, as to all the purposes of this action, is the same; it has the same members, the same objects, and the same property and organization; it has merely changed its name, and added to its members. (*Hendrickson a. Decow*, *Saxt.*, 577.) 2. The bequest was to the executors to pay over to the treasurer of the society, with directions how it shall be expended, to wit, "for the charitable uses of the society and under its direction." 3. This constituted the society the *cestuis que trust*, and the executors the trustees. (*McGirr a. Aaron*, 1 *Penn.*, 49; *Browsers a. Fromm*, *Addis.*, 362; *Hadley a. Hopkins Academy*, 14 *Pick.*, 240; *Hadden a. Chorn*, 8 *B. Mon.*, 70.) 4. The mere transfer of the power over the administration of the trust from one person to another, does not alter the case. (*The Sailor's Snug Harbor Case*, 3 *Peters*, 99; *Laws of 1848*, 288, ch. 177; *Hadley a. Hopkins Academy*, 14 *Pick.*, 240; *State a. Cutler*, 4 *Shep.*, 349; *Sewall a. Cargill*, 3 *Id.*, 414; *Pownell a. Myers*, 16 *Verm.*, 408; *Miller a. Gable*, 2 *Den.*, 492; *Hornbeck a. American Bible Society*,

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2 *Sandf. Ch.*, 133; Potter a. Chapin, 6 *Paige*, 639; Cincinnati a. White, 6 *Peters*, 431.) 5. This is a definite charity, and is a trust which equity will execute, and not suffer to fail by any change in the instrumentalities. (Wade a. Am. Colon. Society, 7 *S. & M.*, 663; Potter a. Chapin, 6 *Paige*, 639.)

IV. It is the duty of this court, as a court of equity, to enforce this bequest. 1. The purpose of the bequest is a recognized legal charity. (Christ's College, 1 *W. Black.*, 90; Moggridge a. Thackwell, 7 *Ves.*, 36.) 2. As such, it is to be received favorably and enforced, unless clearly against law. 3. In such cases, the general jurisdiction of this court embraces it as part of the general power of the court, and irrespective of 43 Eliz. (Beatty a. Kurtz, 2 *Peters*, 584; McCarty a. Orphan Asylum, 9 *Cow.*, 481.) 4. It has such jurisdiction, and will exercise it independent of 43 Eliz., even where the beneficiaries are too vaguely designated to be able to claim for themselves. (Wright a. Trustees, &c., 1 *Hoff.*, 202; Dutch Church a. Mott, 7 *Paige*, 77; King a. Woodhull, 3 *Edw.*, 79; Burr a. Smith, 7 *Verm.*, 241; Attorney-General a. Jolly, 1 *Rich. (S. C.)*, 99; Kniskern a. Lutheran Church, 1 *Sandf. Ch.*, 439.) 5. This charity is sufficiently definite and certain to be enforced. (Going a. Emory, 16 *Pick.*, 107; Bartlett a. King, 12 *Mass.*, 537; Burr a. Smith, 7 *Verm.*, 241; Stone a. Griffin, 3 *Ib.*, 400; Charles a. Hunnicut, 5 *Call*, 311; Coggeshall a. Pelton, 7 *Johns. Ch.*, 292; Shotwell a. Mott, 2 *Sandf. Ch.*, 46; White a. Attorney-General, 4 *Ired Eq.*, 19; Attorney-General a. Wallace, 7 *B. Mon.*, 611; Pickering a. Shotwell, 10 *Barr.*, 23; Winslow a. Cummings, 3 *Cush.*, 358; Sweeney a. Simpson, 5 *Ind.*, 465.) 6. And especially is this so, where, as in this case, there is given a discretionary power to make it certain. (Faversham a. Ryder, 27 *Eng. L. & Eq.*, 367; Whicker a. Hume, 10 *Ib.*, 217; Bull a. Bull, 8 *Conn.*, 48.) 7. It is no objection that the society is unincorporated, for even if a direct bequest to it, it would be valid. (Banks a. Phelan, 4 *Barb.*, 80; Wright a. Trustees, &c., 1 *Hoff.*, 202; King a. Woodhull, 3 *Edw.*, 79; Bartlett a. Nye, 4 *Metc.*, 378.) 8. Even if failing in part, the bequest will be executed as far as possible. The doctrine of *cy pres* obtains in this State. (Coster a. Lorillard, 14 *Wend.*, 308; Gilman a. Hamilton, 16 *Ill.*, 225; 1 *Rev. Stat.*, 748, § 2; 723, § 17; 226, § 38.) And will be enforced, however uncertain the object or

person, whether the purpose can be executed or not, whether the devisees are in *esse* or not, and whether the legatee be a corporation or not. Where a literal execution becomes impracticable, the court will execute it *cy pres*. (4 *Kent's Com.*, 508, n.) The bequest will not be allowed to fail, because the object cannot be found. (*Loscrombs a. Wintingham*, 7 *Eng. L. & Eq.*, 164; *Clark a. Taylor*, 21 *Ib.*, 308; *Richmond County a. Taylor*, *Gilmer*, 336.) In such case, it will be executed to a kindred purpose. (*Winslow a. Cummings*, 3 *Cush.*, 358; *Wheeler a. Smith*, 9 *How. U. S.*, 55; *Wright a. Trustees*, 1 *Hoff.*, 202.)

V. This bequest vested in the lifetime of the American Protestant Society, and passed to these plaintiffs by valid assignment. The testator died 1st January, 1848. The union of the societies did not occur until May, 1849, sixteen months after. Thus the bequest vested. (*Conklin a. Moore*, 2 *Bradf.*, 179; *Patterson a. Ellis*, 11 *Wend.*, 260.) And under the Code, these plaintiffs, being the parties in interest, must sue. (*Code*, § 111.)

VI. This bequest ought to be enforced, on the broad ground that it is "an established principle of American law, that the Court of Chancery will sustain and protect a gift, bequest, or dedication of property to public or charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift or dedication is specific and capable of being carried into effect according to the intention of the donor." (*Potter a. Chapin*, 6 *Paige*, 650, per Walworth, Ch., citing 2 *Kent's Com.*, 286; *Ib.*, 508; 2 *Peters*, 566; 3 *Ib.*, 99; 7 *Verm.*, 241.)

H. Sheldon, for the respondents.—I. The legacy was contingent, and has lapsed and fallen into the residuary estate. 1st. Because neither the legacy nor the interest thereon was to be paid until six years after the decease of the testator, with interest after one year from his decease, and then only to "the person who, when the same should be payable, should act as Treasurer of The American Protestant Society, reorganized under its present name in the year 1844. The testator, by the peculiar wording of the bequest, evidently intended that the payment should depend and be conditioned upon the fact of the

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devisee remaining in a certain *status*. (Patterson a. Ellis, 11 Wend., 259-267.) All the other bequests contained in the will are in the usual form: this alone is an exception,—clearly showing by this the testator's intention, and the principle is familiar that the testator's intention must govern. (*Ib.*, 265-267.) 2d. Because, when the legacy and the interest became due and payable, there was no legatee in existence competent or authorized to receive the same. 3d. Because, on the merger of the three societies, the objects of the consolidated society were entirely dissimilar to those held by The American Protestant Society.

II. The rule as laid down in Jarman on Wills (vol. i., 639), and which, without doubt, is correct, is, that if the payment be postponed with reference to the circumstances of the devisee of the money, the charge fails, unless the devisee is alive to take at the time of payment, and this too though interest in the mean time be given for maintenance. It is undoubtedly true, as claimed by the counsel for the plaintiff in the court below, that where the payment is postponed simply with reference to the time of payment, then the legacy vests on the death of the devisor. (Patterson a. Ellis, 11 Wend., 260.) In the present case, however, the testator made the legacy and the vesting thereof contingent upon the existence of a treasurer of a society known by a certain name; and that he intended that, is amply shown by the peculiar wording of the legacy in question.

III. The leading distinction is, that if futurity is annexed to the substance of the gift, the vesting is suspended, but if it appears to relate to the time of payment only, the legacy vests instant. (1 *Jarman on Wills*; *Perkins' Notes*, 641, § 6; *Williard's Eq. Jur.*, 516; 11 Wend. 259-268; *Snell a. Dee*, 2 *Salk.*, 415.) Futurity is annexed to the substance of the gift in this case in two particulars. 1st. There must be, at the time the legacy is payable, a society by the name of The American Protestant Society; and 2d. A treasurer of a society by that name.

IV. Again, if payment is deferred not merely until the lapse of a definite time which will certainly arrive, but until an event which may or may not happen, the effect, it would seem, is to render the legacy itself contingent. (1 *Jarman on Wills*; *Perkins' Notes*, 643.) And if the contingency happen not, the legacy must of necessity lapse. In this case, the time of

payment is certain, and connected therewith is a certain contingency or condition, which may or may not happen,—that of the existence of an acting treasurer of a society known by a certain name.

V. A gift by will to a particular charitable institution, maintained voluntarily by private means, the particular intention having ceased, held that the gift was not to be disposed of as a charitable gift *cy pres*, but failed and fell into the residue. (Clark *a. Taylor*, 21 *Eng. Law & Eq.*, 308; same case cited by Justice McLean in *Fontain a. Ravenal*, 3 *Am. Law Reg.*, 275, 276; 4 *Kern.*, 380; *Williams a. Williams*, 4 *Seld.*, 525, 548, 550; *Beekman a. People*, 27 *Barb.*, 291.) In this case the intention of the testator ceased upon the consolidation of three associations.

VI. A devise to an unincorporated association is, in general, void at law as well as in equity. (*Chittenden a. Chittenden*, 1 *Am. Law Rep.*, 539; 4 *Wheat.*, 1; 3 *Peters, Ap.*, 481; *Owens a. Missionary Society of the Methodist Episcopal Church*, 4 *Kern.*, 385, and cases there cited.) The present bequest, if sustainable at all, can only be upheld upon the ground that it is for a charitable use. And it is only by virtue of that peculiar jurisdiction exercised by courts of equity, in regard to charitable uses, that such bequests have ever been sustained. (*Id.*)

VII. The present bequest is not a charity or for a charitable use within the spirit of the case last above cited, and the bequest becomes part of the residuary estate. (4 *Kern.*, 409, *DENIO, C. J.*) "Charity, in its widest sense, denotes all the good affections which men ought to bear towards each other; in its most restricted, which is the popular sense, it signifies relief to the poor. (*Bouvier's Inst.*, 255, § 3976.)

VIII. The legacy has become part of the residuary estate for two reasons: 1st. Because, long before the same became payable, the legatee had lost its separate existence, and had in fact ceased to exist, leaving no successors or heirs. And 2d. Because, being a voluntary and unincorporated association, it could not, upon its merger, transfer or assign the legacy in question.

IX. The court, as a court of equity, cannot give effect to the intentions of the devisor, for the reason that the purposes of the trust are too indefinite and uncertain. (See *Owens a. M. E.*

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Church, 4 *Kern.*, 385, opinion of DENIO, C. J.) The objects of the society designated in the will, as well as the objects of the present plaintiff, are loose and indefinite, and a court of equity cannot carry the same out.

X. If the present bequest is to be upheld, and then only as a charitable use, then the attorney-general can alone bring an action in the nature of an information. The present plaintiff, or the society for whom he sues, has no greater interest than all the people at large; and when such is the case, the attorney-general must alone bring the action. (4 *Kern.*, 380; Association for the relief of Indigent Females *a. Beekman*, 21 *Barb.*, 565; same case on appeal, 27 *Barb.*, 260.)

XI. The testator's executors were not made or constituted trustees, but rather as a medium through which the legacy was to pass. The treasurer of the society, or the society itself, was to be the trustee, and the purposes specified in Article II. of the constitution of the American Protestant Society, were the *cestui que trust*.

XII. Again, conceding that the American Protestant Society, or the treasurer thereof, was the trustee, and that the legacy had vested, still upon the merger and consolidation, the legacy failed for the want of a trustee; for in the will there is no power of appointment of a trustee given, and a trustee cannot delegate his powers or make a trustee without being authorized so to do. (Andrew *a. N. Y. Bible and Prayer-book Society*, 4 *Sandf.*, 175, and cases cited; S. C., 4 *Seld.*, 563.)

XIII. If the foregoing reasoning be correct, then the complaint does not state facts sufficient to constitute a cause of action, and the defendant, by omitting to demur, has waived nothing. (*Code*, § 148.)

BY THE COURT.—HOGEBOM, J.—This action is brought to require the defendants to pay the sum of \$3,000, and interest, to the treasurer of the American and Foreign Christian Union, to be by him applied to such charitable uses and purposes as were directed in the will of the defendant's testator, or if such treasurer is not the proper person to receive the same, then to some suitable and proper person, to be appointed by the court as trustee, to receive the said fund, and to apply the same to and for the charitable uses and purposes set forth in the constitution of the Ameri-

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can Protestant Society, and according to the last will and testament of Peter Chandler, deceased, under the direction of the American and Foreign Christian Union.

This is the prayer of the complaint, and the evident object of the suit. It was founded upon the will of Peter Chandler, late of Oswego county, deceased, dated the 30th day of November, 1847, and who died on or about the first day of January, 1848. That will contained the following clause :

"I give and bequeath to my executors the sum of three thousand dollars in trust, to pay over the same in six years from my decease, with interest after one year from my decease, to the person who, when the same is payable, shall act as treasurer of the American Protestant Society, reorganized in the city of New York under its present name in the year 1844, to be applied to the charitable uses and purposes of said society and under its directions."

The defendants refused to pay this legacy, and object to the recovery in this suit mainly on the following grounds: 1. That the American and Foreign Christian Union is not the society for whose benefit and to whose charitable uses and purposes the legacy was given, nor the legitimate successor of its name, principles, or objects. 2. That if it were, it has not such an interest in the legacy as would entitle it to maintain this action, and that additional or other parties are essential for that purpose. 3. That the plaintiff, as the president of that society, is not authorized to sue in his own name, as the representative. 4. That the legacy, if payable at all, is payable only to the treasurer of the institution to whom or which the legacy was given. 5. That the administration of the fund can only be enforced at the suit of the attorney-general, or some trustee to be appointed by the court in the place of one named in the will, whose office has become extinct, and whose functions have ceased by the extinction of the society named in the will.

1. Although the American and Foreign Christian Union is not the identical society, either in name or constitution, for the charitable uses and purposes of which the gift was intended, I am of opinion that it sufficiently represents it to be the recipient of the testator's bounty, and that the testator himself, if he could have foreseen the change of name which the American Protestant Society has undergone, and the enlargement of the

sphere of operations carried on under the auspices of the new society, would not have diverted the destination of his charity from the association now represented by the plaintiff. The original society has become extinct, or rather has been absorbed in the society which is now in existence. The essential objects and policy of both are nearly identical, except that the sphere of operations of the first was confined to the United States, while that of the latter extends also to foreign nations. It would be the duty of the present society, if they receive this gift, to devote it sacredly to the purposes designed by the giver, and there is no reason to doubt that such is their intention, as it is declared to be their wish by the prayer of the complaint; and I am not sure that they would be beyond the power of this court, if they should attempt hereafter in any way to divert it from the purpose to which it was dedicated by the testator.

2. The American Foreign Christian Union (supposing it to be identical with the American Protestant Society) has certainly a species of interest in the legacy in question—the same interest which all religious, benevolent, and charitable institutions have in funds intrusted to them for benevolent objects. It is not a personal interest, that is, a pecuniary interest, by which the society or its stockholders are to be pecuniarily benefited, but an interest in the sense of holding it as a trust, and disbursing and administering it to accomplish the objects of the donor, and the ends for which the society itself is instituted. In this respect it is the ultimate donee of the fund, as well as the trustee to accomplish these objects, for there are no beneficiaries beyond or behind it who have such an interest in the fund that they can demand any portion of it to be appropriated for their special benefit. I think, therefore, if the gift had been directly to this society, or, assuming its identity with the American Protestant Society, directly to the latter, that it would have had a sufficient interest in the fund, conceding its competency to take such gift, to have invoked the aid of this court in requiring its payment to them.

3. And if the gift had been thus made, I think we must hold, in accordance with the general-term decision in *Tibbetts v. Blood* (21 *Barb.*, 650),—construing the act of 1849 (ch. 258), authorizing joint-stock companies or associations, consisting of seven or more shareholders or associates, to sue in the name of

their president or treasurer, as amended by chap. 455 of the Laws of 1851, extending the provisions of the former act to "any company or association composed of not less than seven persons who are owners of or have any interest in any property, right of action, or demand, jointly or in common,"—that this suit would have been well brought in the name of the present plaintiff as president of the American and Foreign Christian Union. Some doubt has been thrown upon the construction of this latter act, and the extent to which its provisions shall be carried, by the opinion of Justice Shankland in the Court of Appeals, in the case of *Austin a. Searing* (16 *N. Y.*, 116), but the court expressly declined to pass upon that question, and we are therefore thrown back upon the case of *Tibbetts a. Blood*, and, in accordance with the general rule, to recognize as authority a general-term decision of this court in another district, until reversed in the Court of Appeals, we must hold in accordance with that decision.

4. It seems to me that the appropriate person, and perhaps the only appropriate person to prosecute for this legacy, is the treasurer of the American Protestant Society—or, if that society and officer have become extinct, his successor (if he be such), the treasurer of the American and Foreign Christian Union. It is to him, and only to him, that the legacy is given, or the legacy made payable, not for his own use, it is true, but for the purposes of the society of which he is an officer. Is there any doubt that if the original society had continued, and its corps of officers been maintained, that this officer could have enforced the payment to him of the legacy as against the executors of the estate, in the Surrogate's Court, or in the Supreme Court?

I think it clear also that the legacy vested at the testator's death, and that the time of payment only was postponed. The gift is a present one, at least to the executors, and from the time they hold it, they hold it as trustees for, and for the benefit of, the officer or institution to whom it is payable. Such was the evident intent of the testator, and it ought not to be defeated. It did not fail, therefore, by the demise of the original society, or its absorption into the present association, before the time of payment arrived; but the executors still retain it for the benefit of the legitimate successor of the treasurer named in the will, and to such successor the executors may, by the aid of this

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court, be compelled to pay it. But such payment must be enforced, I think, by such officer himself, prosecuting on his own behalf. It would be an anomaly in the law to sustain a suit by one person, to enforce payment, not to himself, but to a third person. The party has not a standing in court for such purpose. The suit should be brought by the real party in interest, or by the party who occupies the position of the trustee of an express trust for others.

I think, therefore, the action is misconceived, and that this is an objection which need not be taken by demurrer, or by answer; but may be taken on the trial, on the ground that neither the complaint nor proof shows facts sufficient to constitute a cause of action, that is (and it is that which the Code means), a cause of action in favor of the plaintiff against the defendants.

5. Nor do I think this suit can, or, in its present condition, ought to be sustained as a proceeding for the appointment of a new trustee. Such was not the nature or intent of the action, nor such the theory upon which it has been prosecuted. No such question was made or considered upon the trial, nor is the issue adapted to such an object. The usual mode of appointing a new trustee is by petition, though perhaps it may be appropriately done by bill. (1 *Rev. Stat.*, 730.) But the allegations on the bill, and the prayer for relief, should be properly phrased directly to compass that object, whereas the palpable object of the present suit is to show that the institution represented by the plaintiff is the legitimate successor and representative of the American Protestant Society; that as such, it is beneficially entitled to the legacy in question, and therefore seeks to enforce the payment thereof with costs against recusant defendants who refuse to pay the same. The appointment of a trustee is incidentally suggested, it is true, in the prayer for relief as the proposed recipient of the fund, in case the court shall conclude that the treasurer of the American and Foreign Christian Union is not the appropriate officer for such purpose; but this incidental object ought not, I think, to induce us to overlook the main and leading purpose of the litigation, nor does it justify bringing the defendants into court upon a question in which, if such were the sole object, they have so remote and scarcely appreciable an interest. I am, therefore, opposed to con-

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verting this suit into one for the mere appointment of a new trustee.

I think, therefore, the referee was right in the conclusion to which he arrived, that the action, in its present form, is not maintainable. But it being an equity suit, in which a dismissal of the complaint is ordinarily equivalent to a decision upon the merits against the complainant, and a bar to a new action, it ought to have been dismissed without prejudice to a new action by a proper party or proper parties, and without prejudice to proceedings for the appointment of a new trustee in the place of the treasurer of the defunct American Protestant Society, if such course shall be thought proper by parties interested, and the institution of a new suit by such new trustee, if the parties interested shall be so advised.

The judgment of the special term should be thus modified, and neither party should have costs as against the other on this appeal.

SUTHERLAND and BONNEY, JJ., concurred in the result of the foregoing opinion.

VAN WYCK *a.* HARDY.

Supreme Court, First District; General Term, December, 1860.

PARTITION.—AMENDMENT OF SUMMONS.—OF PETITION.—SERVICE BY PUBLICATION.

Where, in a partition suit, the names of certain defendants, through inadvertence, were omitted from the copy summons filed ;—

Held, that this was not conclusive that they had not been made parties, and they having been actually parties, the summons might be amended after judgment and sale.

Where the summons, as published, was dated New York, and stated that the complaint was filed in the clerk's office in that city ;—

Held, that designating the place of the office of the attorney, by street and number, without adding the name of the city, did not render it void.

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An affidavit of the non-residence of certain defendants on information and belief,—*Held*, sufficient to sustain an order for service by publication, founded on it.

An order for service by publication, granted on the 18th, directed the summons to be mailed forthwith.

Held, that a delay in mailing till the 22d, caused by waiting to have the papers printed, did not render the service irregular.

The want of a verification by an infant defendant to his petition for the appointment of a guardian *ad litem*, may be allowed to be supplied after judgment; though, it seems, the court may dispense with such verification.*

Appeal from order allowing purchaser at a judicial sale to be discharged, unless certain amendments were made by the plaintiff.

The action was for partition. The complaint was filed in the clerk's office on the 14th of October, 1859. The copy summons filed omitted the names of S. A. Maverick and wife, who were defendants. The order of publication was made on the 18th of October, 1859. The deposit in the post-office of the summons and copy complaint for the non-resident defendants, was made on the 22d day of October, 1859. The reason of this delay was, that printed copies of the summons and complaint were not obtained by the plaintiffs' attorney from the printer, until the evening of the 21st day of October, 1859, and could not be obtained earlier, and were mailed as soon as practicable thereafter, on the 22d day of October, 1859. The summons, as published in the Evening Post, one of the papers designated in the order of publication, omitted the words "in said city of New York," after the words "number 13 Chambers-street," designating the office of the plaintiffs' attorney. It stated, however, that the complaint was filed in the clerk's office of the city of New York, and was dated New York, October 14, 1859. The petition for the appointment of a guardian for Samuel M. Thompson, a non-resident infant over fourteen years of age, was not verified by the infant or by his guardian, but was signed by the infant, and the signature verified by the affidavit of the plaintiffs' attorney, who stated that he sent it to the infant, and received it back from him with his signature—the verification not being made, according to a letter from the infant, in conse-

* Compare Rogers & McLean, *Ante*, 440.

quence of his not having access to a judge. Judgment was entered and perfected on the 21st of May, 1860. The premises were sold by the referee on the 6th of July, 1860, and the lot number 174 South-street, part of the premises, was sold to Thomas Hitchcock, the petitioner, for \$10,025, who signed the usual terms of sale, and paid ten per cent. upon his bid. The deed was to be delivered on the 6th of August, 1860.

Under the advice of counsel, that the referee's deed would not convey a good title, the purchaser declined to take the deed, and presented his petition to the special term, setting forth the foregoing and other alleged irregularities, and praying to be discharged from his purchase. Thereupon an order was made by Mr. Justice Ingraham, at special term, and bearing date the 22d day of September, 1860, allowing him to be discharged from his purchase, unless the irregularities in the proceedings were corrected, and denying the application, in case such corrections were made within thirty days after the service of the order.

The order required the plaintiff,—

I. To amend the summons on file, by inserting therein the names of Samuel A. Maverick and Mary A. his wife, as defendants ;

II. To file proper notices of appearance for all the defendants who appeared and did not answer ;

III. To file the petition of the infant defendant, Samuel M. Thompson, in due form, and sworn to by him, for the appointment of Mortimer Porter, as his guardian *ad litem* in this action ;

IV. To file such answers as had been put in and were not filed ;

V. To give notice thereof to the attorney for the purchaser, and pay him \$10 costs of the motion.

The petitioner appealed from this order ; and the plaintiff appealed from so much of it as required him to procure and file the verified petition of Samuel M. Thompson, for the appointment of a guardian as above mentioned.

It was understood that since notice of the motion was given, and since the making of the order at special term, the plaintiff had procured and filed the petition of the infant, Samuel M. Thompson, required by the order of the special term.

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The other facts, so far as they are material, are stated in the opinion of the court.

J. H. Lee, for the plaintiffs.

N. B. Howie, for purchaser.

By THE COURT.—HOGEBROOM, J.—I. The objection to the summons is not well taken. Samuel A. Maverick and wife were, and were intended to be, parties to the suit. The summons is not necessary to be filed as a mode of commencing the suit, and if filed, and erroneous by inadvertence or mistake in some way as to the names of the parties, is not conclusive to that extent on the point of who are parties to the suit, that it is incapable of contradiction or correction. It is not necessarily *the* summons in the suit by way of eminence over all others. In this case, these two names were omitted in the copy filed by inadvertence, and I have no doubt the error is such as may be corrected by amendment. This has been done, and the error is cured.

II. The second alleged jurisdictional defect is, that the non-residence in this State, and the actual place of residence of the defendants Thomas J. Turpin and Drusilla E. L. Dillard, are not sufficiently established in the affidavit upon which the order of publication was founded, or in the order itself. By the complaint in the action, which is verified and is presumed to have been presented to the judge before he made the order of publication, it appears that the suit is brought for the partition of premises in the city of New York, and that the plaintiffs are the tenants in common and the near relatives of the other parties in interest. By the affidavit of the plaintiff, William Van Wyck, on which, more particularly, the order of publication was founded, the non-residence in this State, and the actual residence in South Carolina of Thomas J. Turpin and Drusilla E. L. Dillard, is alleged on the deponent's information and belief. In said affidavit it is further alleged as follows: "And deponent further says, that after due and diligent search and inquiry by this deponent, the said defendants named in the body of the affidavit cannot be found in the State of New York, as he is informed and verily believes." The order recites that it appears to the court that these defendants are non-residents

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of the State of New York, and cannot be served with said summons in the State of New York. The written statement of facts agreed on by counsel shows that on the 22d day of October, 1859, a copy of the summons and complaint were deposited in the post-office, addressed to each of said non-resident defendants at their respective places of residence. I am inclined, though with some hesitation, to regard this proof as sufficient to confer jurisdiction upon the judge to make the order—as sufficient to satisfy him legally of the non-residence and the place of residence of these parties, and of the inability to find them in this State. The affidavit is made by a relative who would be likely to know or to ascertain the real truth of the case. And when he speaks of information and belief in regard to a matter of this sort, it is obvious, from the subject-matter of the inquiry, and from the context in the affidavit itself, that he refers to information obtained from the proper source, and from those who would be likely to know. The effort to find these defendants in the State, I infer from the affidavit, was made by the deponent, and the inability to find them, was thereupon stated on information and belief. He could not well have absolute and positive knowledge on that subject, although he could speak positively, as I think he intended to do, on the exercise of diligence. As to the actual non-residence of these defendants, it is not controverted; and the purchaser of premises, at a sale in a suit where publication has been ordered, must be deemed to know that he purchases subject to the power of the court to relieve parties against whom publication is ordered, upon good cause shown, both before and after judgment, within seven years after the rendition thereof. I am inclined to think also that the judgment itself is of no effect in any case where it subsequently appears that the case does not fall within one or more of the five different subdivisions of section 135, in which contingency alone can publication ever be properly made. (*Code*, § 135.)

III. The publication of the summons in the Evening Post I do not regard as so defective as to make it void. It could not mislead. It sufficiently indicated the city of New York as the place of business of the plaintiffs' attorney. New York was given as the date of the summons and the place where the complaint was filed, and no other place was named to which the reference as to the street could possibly refer.

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IV. The order properly required the summons and complaint to be served upon non-residents, by depositing the same *forthwith* in the post-office, directed to such persons. The order was made on the 18th of October, and the deposit in the post-office was on the 22d. The delay is sufficiently excused. If *forthwith* means *instantly*, a literal compliance with the order and with the statute is almost impossible. Some little time, therefore, may be permitted to elapse without forfeiting jurisdiction over the person of the defendant.

A reasonable construction must be given to this provision; and I do not see that any absolutely uniform and inflexible period can be established as amounting to a compliance with the statute, non-conformity to which will make the proceedings void. *Forthwith* has no legalized meaning, either extending or limiting it to twenty-four hours; and the Legislature, having used a term incapable of being rigorously complied with to the letter, must have intended to authorize the courts to put a reasonable interpretation upon the term; and the period, I think, may vary slightly according to the circumstances of the particular case. This may lead to some doubt and hesitation in advising as to the validity of these proceedings, and to some uncertainty as to what will be the decision of the court in a particular case, but that is incident to the very nature of judicial proceedings. The only corrective is with the Legislature, by prescribing a fixed period of time within which the service is to be made. In the absence of such an enactment, I think the word *forthwith*, in this connection, should be construed as synonymous with all reasonable dispatch. So construed, the order and the statute have been complied with in the present case.

V. The appointment of the guardian *ad litem* for the defendant, Samuel M. Thompson, though not strictly formal and conformable to the rules of the court by reason of the non-verification of the petition by the infant, was not, I think, jurisdictionally defective. The court had the power to recognize and make valid any other mode of verification of the petition which satisfied it of the truth of the facts therein contained. There is no such unbending rigor in the practice of the court. The importance of the petition consisted in its being the voluntary act of the petitioner.

This would appear as strongly, perhaps, by proof of the exe-

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cution of the paper by the infant as by its verification by him. The execution was sufficiently established. At all events, the error, if any, was cured by the procurement (which we understand has been done) of a proper petition duly verified, and filing the same in the proper office—in conformity with the order of the special term, which very properly required that this should be done, as an efficient protection to the purchaser.

The order of the special term seems to me to have been substantially right, and should be affirmed. Both parties have appealed therefrom, and I think the affirmance should be without costs to either party as against the other.

SUTHERLAND, J., concurred.

BONNEY, J., dissented.

ERRATA.

On page 54, line 16, for "but," read "or."

" 55, " 10, for "prostitutes," read "prostitution."

" " 18, for "public," read "police."

D I G E S T

OF

ALL POINTS OF PRACTICE

EMBRACED IN

THE STANDARD NEW-YORK REPORTS,

Issued during the period covered by this Volume :

VOL.—21 NEW YORK (7 Smith) R. ; 31 BARBOUR ; 4 BOSWORTH ; 11 ABBOTTS' PR. R. ;
and 19 HOWARD'S PR. R.

ABATEMENT AND REVIVAL.

1. If a party dies pending a motion, the decision of which will not finally determine the action, an order of revival must be had before the decision of such motion can be entered. *Reed v. Butler, Ante, 128.*
2. In an action under the Code, to recover the possession of land, corresponding to the former action of ejectment, the death of a sole defendant before verdict, abates the action ; and the court has no power to authorize the continuance of the action, by supplemental complaint or otherwise, against his heirs at law. *Mosely v. Mosely, Ante, 105.*
3. *It seems*, that in respect to this question, the action of ejectment stands on the same ground as that of replevin. *Ib.*

ACKNOWLEDGMENT OF DEEDS.

DEED, 2.

ACTION FOR LANDS.

1. A soldier of the United States, claiming to be in charge, under superior officers, of real property, as property of the United States, is not the actual occupant, and an action cannot be maintained against him. *People v. Ambrecht, Ante, 97.*

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AFFIDAVIT.

2. Under the Code, a mere equitable mortgagee is entitled to prevail against an action to recover the possession of the land by the purchaser; the remedy of the latter is by suit to redeem from the mortgage, and for an accounting if necessary. *Ct. of Appeals*, 1860, *Chase v. Peck*, 21 *N. Y. (7 Smith)*, 581.

ABATEMENT, 2, 3.

AFFIDAVIT.

SERVICE, 4, 5.

AFFIRMATIVE RELIEF.

ANSWER, 1; COUNTER-CLAIM; LIMITATIONS, 3.

ALIMONY.

- An application by the plaintiff for alimony in an action of divorce, denied on the ground of doubt of her ultimate success. *Carpenter v. Carpenter*, 19 *How. Pr.*, 539.

AMENDMENT.

1. Where, in a partition suit, the names of certain defendants, through inadvertence, were omitted from the copy summons filed;—
Held, that this was not conclusive that they had not been made parties, and they having been actually parties, the summons might be amended after judgment and sale. *Van Wyck v. Hardy*, *Ante*, 473.
2. A purchaser at a judicial sale is not necessarily to be discharged on account of formal defects in the verification of a petition for the appointment of guardian for an infant defendant in, the action in which the sale is decreed, or formal defects in the authentication of the verification; but such defects may be supplied by amendment, *nunc pro tunc*. *Rogers v. McLean*, *Ante*, 440.
3. The court have not power to amend a judgment, on motion, by qualifying its provisions in a respect in which there was no mistake, nor any omission of a direction which would have been inserted, as of course, if originally asked for. *New York Ice Co. v. Northwestern Insurance Co.*, *Ante*, 419.
4. That the difference between a complaint founding an action for damages on a *refusal to fulfil* a contract, and proof of *refusal to execute* an instrument agreed on as embodying the same contract,—is formal and

AMENDMENT.

curable by amendment. *Pratt v. Hudson River Railroad Co.*, 21 *N. Y.* (7 *Smith*), 305.

5. *It seems*, that after trial the court should not allow the complaint to be amended by inserting allegations of a further claim, the facts of which were known to the plaintiff before the commencement of the action. *Bulen v. Burdell*, *Ante*, 381.
6. The fact that a proposed amended answer contains a positive denial of the allegations of the complaint, while the original answer only denies them on information and belief, is not an objection to allowing it. *N. Y. Superior Ct., Sp. T.*, 1860, *Shanks v. Rae*, 19 *How. Pr.*, 540.
7. On allowing an amendment introducing a new cause of action, or introducing allegations necessary to complete the facts alleged, which otherwise would not show a cause of action, defendant should be allowed to answer as a matter of right. *Union Bank v. Mott*, *Ante*, 42.
8. In such case the court cannot require that testimony already taken in the cause should stand. *Ib.*
9. Amendment should be made not at the expense of the opposite party. *Ib.*
10. In an action for services the plaintiff had judgment, which, on appeal was reversed, and a new trial ordered, the costs to abide the event, on the ground that the written contract between the parties provided that payment was to be made after the Common Council of defendants had made an appropriation therefor, and that the complaint contained no allegation of an appropriation, or a petition therefor.

Held, that plaintiff's motion for leave to amend his complaint by inserting allegations in conformity to the opinion of the general term should be granted, on condition of his paying the defendants' taxable costs since the answer was served, and relinquishing his right to the costs of the appeal which had been ordered to abide the event of the new trial, in the event of his succeeding in the action. [6 *Hill*, 377.] *N. Y. Com. Pl., Chambers*, 1860, *McGrane v. Mayor of New York*, 19 *How. Pr.*, 144.

11. Defendant permitted to amend answer on paying \$10 costs of motion, and stipulating that if the plaintiff should discontinue, he would waive all costs accrued between the time of serving the original answer and the time of serving notice of discontinuance. *Shanks v. Rae*, 19 *How. Pr.*, 540.

CASE; COMPLAINT, 4, 19; GUARDIAN; SERVICE, 3; SPECIFIC PERFORMANCE, 2; TRIAL, 2, 3.

ANSWER.

ANSWER.

1. An accommodation acceptor, who is liable merely as surety, and entitled to subrogation, may set up a demand for subrogation in his answer. *N. Y. Superior Ct., Sp. T., 1860, Bank of Toronto v. Hunter, 4 Bosw., 646.*
2. In an answer to a complaint for libel, matter which is alleged in justification, may also properly be alleged in mitigation of damages. *Howard v. Raymond, Ante, 155.*
3. In an action in the nature of an action on the case, against the sheriff for an escape,—since by 2 Rev. Stat., 437, § 61, the plaintiff can only recover actual damages,—defendant is at liberty to plead and prove that, at the time of the escape, the prisoner was wholly destitute of property; and this, though constituting only a partial defence, may be pleaded as a separate defence. [16 N. Y., 297.] *N. Y. Superior Ct., 1859, Loosey v. Orser, 4 Bosw., 391. Compare SHERIFF, infra.*
4. By including a defence upon the merits in the same answer with the defence of a former suit pending for the same cause of action, the defendant does not waive the latter defence. The Code provides for but a single answer, in which the defendant is required to include every defence upon which he relies to defeat the action. [4 Kern., 465.] *Ct. of Appeals, 1860, Gardner v. Clark, 21 N. Y. (7 Smith), 399; Overruling a previous decision in the same case, 6 How. Pr., 449.*
5. Since, if in such case the jury find a general verdict, it will be impossible to determine whether the judgment rendered upon the verdict should operate as a bar to another suit for the same cause of action, or not; it would be the duty of the judge at the circuit to distinguish between the several defences in submitting the case to the jury, and require them to find separately upon them. *Ib.*
6. Where the disability of the plaintiff, who is a married woman, does not appear upon the face of the complaint, the defendant, if he intends to avail himself of the coverture as a defence to the action, should set it up in his answer. By a mere general denial he waives it. *Supreme Ct., 1860, Dillaye v. Parks, 31 Barb., 132.*
7. Where usury is a defence, defendants are bound to set up in the answer the contract, whatever it was, giving its terms, and the amount of the usurious premium or interest taken by the lender. And the usury must be proved as set up in the pleading. [4 Paige, 526; 8 Ib., 457; 11 Ib., 17; 3 Hill, 665; 11 Barb., 100; 12 Ib., 601.] *Supreme Ct., 1860, Griggs v. Howe, 31 Barb., 100.*
8. A general averment that the note on which the suit is brought is

ANSWER.

- void for usury, without averring what the usurious agreement was; between whom it was made; the quantum of usurious interest that was agreed upon and received; nor that the agreement was intentionally usurious and corrupt, is frivolous. [4 Paige, 526; 8 Ib., 452; 11 Ib., 15.] Under the Code, which requires the facts constituting a defence to be plainly and concisely set forth, this rule cannot be deemed to be relaxed. [10 Barb., 821; 12 Ib., 601.] Such an answer is bad in substance. *Ct. of Appeals*, 1860, *Manning v. Tyler*, 21 *N. Y.* (7 *Smith*), 567.
9. An allegation in an answer, that the defendant was arrested upon a capias, at the suit of the assignor, is not a good plea of a former action pending for the same cause; and it not appearing that a declaration was filed or served, the pleading is not helped by the averment that the capias was for the same identical cause of action. *Ct. of Appeals*, 1860, *Gardner v. Clark*, 21 *N. Y.* (7 *Smith*), 399.
 10. In an action for goods sold, or for services, the allegation of the value thereof in the complaint is material, and a verified answer containing a denial of that allegation cannot be stricken out as sham. *Gregory v. Wright, Ante*, 417.
 11. In an action for divorce, an answer setting up plaintiff's adultery as a defence, need not allege the inhabitancy of the parties, or either of them. *Supreme Ct., Sp. T.*, 1860, *Leseuer v. Leseuer*, 81 *Barb.*, 330.
 12. The ability of the plaintiff to demur, under section 153 of the Code of Procedure, to one or more of the defences set up in the answer, does not preclude a motion, under section 152, to strike out such matter from the answer as irrelevant. *Lee Bank v. Kitching, Ante*, 435.
 13. An answer which contains a denial of any material allegation of the complaint, if verified, cannot be stricken out as sham. *Gregory v. Wright, Ante*, 417.
 14. Each defence in an answer, which, by the very words of such defence is declared to be "a further, separate, and distinct defence," must be complete in itself, and must contain all that is necessary to answer the whole cause of action, or that part of it which it professes to answer. [7 *Abbotts' Pr.*, 378; *S. C.*, 2 *Bosw.*, 694.] It cannot be made good by a resort to other distinct parts of the answer to which such defence contains no reference, either in terms or by necessary and just construction. *N. Y. Superior Ct.*, 1859, *Loosey v. Orser*, 4 *Bosw.*, 391.
 15. On allowing a defendant to put in a supplemental answer, in the nature of a plea *puis darrein continuance*, the court may, in their discretion, impose, as a condition, that defendant waive other defences; and this should be done where the sufficiency and equity of the pro-

APPEAL.

posed defence is doubtful. *N. Y. Superior Ct., Sp. T., 1859, Bate v. Fellowes, 4 Bosw., 638.*

AMENDMENT, 6; CONSUL; COSTS, 7; COUNTER-CLAIM; DEFENCES; PLEADING, 5.

APPEAL.

1. An order which violates the strict legal rights of a party is appealable. *Union Bank v. Mott, Ante, 42.*
2. Where a motion is made to the court to open a default as a mere favor to the moving party, the power of the court being conceded, an order, either granting or denying such motion, either absolutely or on terms, will not be reviewed on appeal. In such case, no substantial right is violated; for relief from the default, in such case, is not a matter of right. The motion does not involve the merits; for the opposing party being in all respects regular, no rule of law or practice has been violated, and the merits of the action are not the questions in any wise to be determined on such a motion. [3 Code R., 141; 1 Comst., 43; 2 E. D. Smith, 223.] *N. Y. Superior Ct., Sp. T., 1860, Foshay v. Drost, 4 Bosw., 664.*
3. Under section 6 of the act establishing the City Court of Brooklyn, as amended in 1850 (*Laws of 1849, 170, ch. 125; Laws of 1850, 148*),—authorizing an appeal to the Supreme Court “from any judgment or final determination of said City Court, and from any intermediate order involving the merits, and necessarily affecting the judgment,”—an appeal will lie to the Supreme Court, from an order made by the City Court of Brooklyn, before a judgment in the action, when such an order is in its nature appealable. *Supreme Ct., 1860, Moore v. Wood, 19 How. Pr., 405; Bennett v. City of Brooklyn, Ib., 310.*
4. The phrase “involves the merits and necessarily affects the judgment,” is to be read as meaning an order which will necessarily affect the judgment, and as referring to future as well as existing judgments. An order granting a new trial obviously involves the merits. Though the application in the court below was addressed to the discretion of the court,—*e. g.*, where it is founded on newly-discovered evidence,—it is to a legal discretion, limited and controlled by legal rules, and which is therefore open to review and examination by those rules upon an appeal. *Supreme Ct., 1860, Bennett v. City of Brooklyn, 19 How. Pr., 310.*
5. An order under section 122 of the Code, substituting an adverse claimant as a defendant, is appealable. *Wilson v. Duncan, Ante, 3.*
6. A notice of judgment is defective when it omits to state the clerk's

APPEAL.

- office in which the judgment is entered; and such notice does not limit the time of the opposite party to bring his appeal. *Supreme Ct., Sp. T., 1859, Valton v. National Loan Fund Life Assurance Society, 19 How. Pr., 515.*
7. Proceedings supplementary to execution are proceedings in the cause considered as a sort of additional or equitable execution. And although they are had in the county where a debtor resides, without reference to the venue of the action, an appeal in such proceedings must be had only in the judicial district where the venue of the action was laid. *Supreme Ct., 1860, Gould v. Torrance, 19 How. Pr., 560.*
 8. An appeal by defendant from an order denying a motion for a new trial, without stay of proceedings, either by order or by giving such security as makes the appeal a stay, does not preclude the plaintiff from entering judgment. But the entry of judgment does not affect the prior appeal from the order; and the general-term decision of affirmance on such an appeal is itself appealable to the Court of Appeals, as if no judgment had been entered. *Supreme Ct., Sp. T., 1859, Valton v. National Loan Fund Life Assurance Society, 19 How. Pr., 515.*
 9. A reversal of the decision of the general term by the latter court, would be a decision granting a new trial, and an order would then be required to stay proceedings on the judgment in chief. In such case, a motion by plaintiff to stay proceedings on the appeal from the order, until the appeal from the judgment could be heard, cannot be entertained by the Supreme Court after the appeal from the order has been taken, and is pending in the Court of Appeals. *Ib.*
 10. On appeal from a judgment directing the delivery of personal property, such as will depreciate by time and use, it would not be just for the court to allow a stay of proceedings upon an undertaking to obey the order of the court upon the appeal, under section 336 of the Code of Procedure. The respondent should have indemnity for the use and the depreciation of the property in case the judgment is affirmed. *Read v. Potter, Ante, 413.*
 11. Where an appeal from a judgment confirming the proceedings in a street case, is brought by a part of the owners as to whom an award is made, every thing essential to show jurisdiction and regularity must appear in the appeal-papers; but that part of the commissioners' report which applies exclusively to other parties, and does not throw light on the appellant's case, may be stated in the most general terms. *Matter of Fourth Avenue, Ante, 189.*
 12. On appeal from the judgment only, the exceptions which were taken at the trial only can be considered. Points relating to the sufficiency of the proofs, however proper on a motion for a new trial, are not open

APPEAL.

- to consideration as a ground of reversal of the judgment. Where the defendants' motion for a new trial is denied, if they do not appeal from the order denying it, they must be taken to have acquiesced, and therefore to have waived all grounds for a new trial, except such questions of law as, under the exceptions taken, may be raised on an appeal from the judgment. *N. Y. Superior Ct.*, 1859, *Rider v. Union India-rubber Co.*, 4 *Bosw.*, 169; to the same effect, *Anthony v. Smith*, *Id.*, 503.
13. An objection which does not appear by the bill of exceptions to have been taken on the trial, cannot be considered on appeal. *Ct. of Appeals*, 1853, *Bagley v. Smith*, 19 *How. Pr.*, 1.
 14. Referee's reports and statements of facts presented to the Court of Appeals, are not construed with the strictness which was applied, at common law, to special verdicts. Error on the part of the court below, will not be presumed, but must be made clearly to appear. Hence it is incumbent upon the appellant to take care so to present the facts upon which the case depends, as to show affirmatively that an error has been committed. The court will presume nothing in favor of the party alleging the error; but if compelled, through the imperfection of the statement of facts, to resort to presumptions at all, will adopt such only as will sustain the judgment. *Ct. of Appeals*, 1860, *Carman v. Pultz*, 21 *N. Y.* (7 *Smith*), 547.
 15. In an action on a note drawn payable to, and indorsed to the plaintiffs by, an insurance company, neither the pleadings nor evidence showed that the company was incorporated. *Held*, that on an appeal the court should treat the case as if the company was unincorporated. *N. Y. Superior Ct.*, *Fish v. De Wolf*, 4 *Bosw.*, 573.
 16. The error of plaintiffs in describing themselves as "Trustees of the First Church," &c., instead of as the "First Church," &c., being a subject of amendment in the court below, is not ground of reversing on appeal a judgment obtained by them. *Ct. of Appeals*, 1860, *Trustees of First Baptist Society in Syracuse v. Robinson*, 21 *N. Y.* (7 *Smith*), 234.
 17. The Court of Appeals never reverses a judgment on the ground of a variance which may be cured by amendment. [18 *N. Y.*, 515.] *Ct. of Appeals*, 1860, *Bennett v. Judson*, 21 *N. Y.* (7 *Smith*), 238; *Cardell v. McNeil*, *Id.*, 336.
 18. On appeal from a Surrogate's Court, the court will not reverse a decree to which the respondent is justly entitled upon the merits, because a contumacious witness of the appellant refused to obey the process of the court, or to furnish the evidence which it demanded, or because the surrogate, it may be improperly, refused to punish him for his refusal. *Supreme Ct.*, 1860, *Hegeman v. Fox*, 31 *Barb.*, 475.

ATTACHMENT, 7; ATTORNEY, 5.

ARBITRATION.

ARBITRATION.

1. A submission to arbitration submitted the controversy to two arbitrators, with authority "to select a third party not interested," &c., "to decide any point of disagreement between them, whose decision shall be final."

Held, that in case of a disagreement, it was essential to the validity of the award that it should be signed by the umpire selected. *Jackson v. Merritt*, 370.

2. An action upon an award may be brought in the Supreme Court, although the submission provides for judgment in the County Court. The right of action is not suspended until the term of the County Court succeeding the award. If the defendant desires to move that court for relief, he may obtain a stay of proceedings. The statute, prescribing certain forms for submission to arbitrators, and allowing the parties to agree that a judgment of a court of record designated in the instrument of submission should be rendered upon the award, is cumulative merely, not exclusive [24 Wend., 258; 2 Hill, 271], and the right of action on the award still remains. *Ct. of Appeals*, 1860, *Burnside v. Whitney*, 21 N. Y. (7 Smith), 148.

ARREST.

1. An action for criminal conversation is an action for injury to the person within subdivision 1, of section 179 of the Code; and the defendant is liable to arrest. [4 How. Pr., 234; 3 Code R., 9; 3 Blackst., 139; 4 Cow., 412.] *N. Y. Superior Ct.*, 1859, *Straus v. Schwartzwaelde*n, 4 *Boer*, 627.
2. Where defendant after having borrowed money on a promise to apply it to a specific use, converted it to another use;—
Held, that he was liable to arrest for a fraud in contracting the debt. *Lovell v. Martin*, *Ante*, 126.
3. In an action in the nature of an action on the case against partners, for obtaining goods from plaintiffs by fraud, a partner who did not participate personally in the fraud is liable to arrest, as well as those who did. *Townsend v. Bogart*, *Ante*, 355.
4. If the affidavits show such a cause of action, it is not to be inferred that the complaint will not state a cause of action of that nature, because the affidavits allege that the action is brought to recover the price of goods sold. *Ib.*
5. In an action against partners, to recover a debt of the copartnership,

ASSESSMENT.

- in contracting which some of the partners were guilty of a fraud, all the partners are liable to arrest. *WOODRUFF and ROBERTSON, JJ., dissented. Ib.*
6. The provision of the Code that "no female shall be arrested in any action, except for a wilful injury to person, character, or property" (*Code, § 179*), exempts a female defendant from arrest in an action for debt, although she may have fraudulently contracted such debt. *N. Y. Superior Ct., Sp. T., 1860, Wheeler v. Hartwell, 4 Bosw., 686.*
 7. An order of arrest should not be vacated merely on the ground that one of the plaintiffs is not a proper party. *Webber v. Moritz, Ante, 113.*
 8. In an action for a conversion, an order of arrest is not to be vacated on mere denial of plaintiff's affidavits. *N. Y. Superior Ct., 1859, Cousland v. Bliss, 4 Bosw., 619. **
 9. Defendants, upon the faith of their explicit representations that their stock of goods were worth \$20,000, obtained, on the last day of October, a loan of \$10,000 from the plaintiffs, positively assuring them that this loan would prevent their failure. On the 6th of January following, they transferred their stock to plaintiffs, on account of their indebtedness, representing the stock to be worth \$9,000; but after appraisal, they consented that plaintiffs should credit them with \$4,000 for it, and on a sale it brought even less. In an action to recover the remainder of the indebtedness, the plaintiffs caused the defendants to be arrested.

Held, that they were not entitled to discharge from arrest in the absence of definite explanations as to the deficiency in the amount of property which they had represented they had. Without such explanation it must be inferred that either they intentionally misrepresented the value of the property to get the loan, or afterwards made away with a large portion of the property, with the design of defrauding their creditors. *Wilmerding v. Mooney, Ante, 283.*

ASSESSMENT.

1. An owner of land assessed for a local improvement, cannot invoke the equitable powers of the court to relieve against omissions or irregularities in the proceedings of the commissioners. *Kelsey v. King, Ante, 180.*
2. Where mortgaged premises are taken by a municipal corporation for a public improvement, and the whole damages are awarded and paid to the mortgagor, the proceedings being regular, the mortgagee has no right to recover against the municipal corporation the amount of

ASSIGNMENT.

the mortgage. Either the mortgagee's rights as to the land are cut off by the proceedings, or not; and if not, the remedy is by foreclosure. *Sherwood v. Mayor of New York, Ante, 347.*

3. Under a lease providing that the lessee shall bear all assessments imposed on the premises during the term, if a part of the premises are taken for a public improvement, and damages therefor assessed to the owner and to the lessee respectively, for their interests, the assessment for benefit laid upon the residue of the premises must be borne wholly by the lessee. *Trinity Church v. Cook, Ante, 371.*

EXECUTION, 5, 6.

ASSIGNMENT.

1. A right of action for the conversion of personal chattels is assignable [2 Kern., 622]; and whenever a right is vested in one growing out of a contract of any nature, it is assignable; and if the assertion of the original right involves the establishing of fraud or deceit connected with the action, the right to prove this follows the right to the original cause of action, and vests in the assignee with it. *N. Y. Superior Ct., 1859, Westcott v. Keeler, 4 Bosw., 564.*
2. An assignment of a "judgment, and of all sum and sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon," transfers to the assignee a cause of action against the sheriff on his liability as bail for a defendant arrested by him in the action. [6 Duer, 182.] *N. Y. Superior Ct., 1859, Gallarati v. Orser, 4 Bosw., 94.*
3. An assignment of the partnership effects of an insolvent firm to pay preferred private debts of one of the partners, for which neither the firm nor his copartner are liable, is fraudulent and void as against the creditors of the firm. *Ct. of Appeals, Wilson v. Robertson, 21 N. Y. (7 Smith), 587; S. C., 19 How. Pr., 350.*
4. The assignee of a bond and mortgage,—*Held*, not to be subject to existing equities, in a peculiar case. *Supreme Ct., 1860, Cornell v. Townsend, 19 How. Pr., 184.*
5. The power to compel an assignee for the benefit of creditors, to account, &c., which is conferred upon the courts by the act of 1860 (*Laws of 1860, 595*), is intended to be substantially such as is conferred by law upon surrogates respecting the estates of deceased persons, with the proviso, however, that the same shall not be exercised until the lapse of one year from the date of the assignment. The court cannot call upon the assignee to account, or direct him in any way respecting the distribution of the trust fund until the year has expired. *Matter of Nelson, Ante, 352.*

ASSISTANCE (WRIT OF).

6. *It seems*, that at that time, if he has not closed his trust, a full and final accounting may be had, in which the rights of all persons concerned may be as fully determined as in the ordinary equity action which any creditor may bring to close up an assigned estate and obtain payment of the portion of it to which he may be entitled, and distribution directed accordingly. *Id.*

CONSTRUCTION, 2.

ASSISTANCE (WRIT OF).

1. Upon a sale in foreclosure, the court gives possession to the purchaser as against all persons who are parties to the suit, or who came into possession under either of them pending the suit, but does not undertake to remove persons who go into possession after the purchaser has received his deed, and conveyed the premises to another. *Betts v. Birdsall, Ante, 222.*
2. One who enters over fifteen months after the sale, is not to be deemed as having entered pending the suit, and cannot be removed by a writ of assistance, though he entered under a party to the suit. *Id.*

ASSOCIATIONS.

PARTIES, 8.

ATTACHMENT.

1. An attachment, as a provisional remedy under the Code, may issue as well in actions to recover damages for wrongs, as in actions of contract, when defendant is not a resident of the State, or has departed with intent to avoid service, or keeps himself concealed with that intent. An action to recover damages for a wrong is deemed an action for the recovery of money. *Floyd v. Blake, Ante, 349*; to the contrary is *Gordon v. Gaffey, Id., 1.*
2. Under section 229 of the Code,—which requires, as a foundation for a warrant of attachment, that it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the ground thereof,—if the action is for an accounting, and the complaint shows that the plaintiff is unable to state the amount due him, his affidavit that there is a certain sum due him, is not enough to authorize an attachment. *Ackroyd v. Ackroyd, Ante, 345.*
3. If the plaintiff shows that he does not and cannot know whether any thing is due him, his statement of his opinion as to the amount is not enough. *Id.*

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4. In an action upon a money bond, payable in instalments, where there is only one instalment due, and the plaintiff, before judgment, issues and seizes by attachment the personal property of the defendant, his lien by the attachment, as against other creditors acquiring an intermediate title or lien upon the property, is only to the extent of the amount actually due upon the bond at the time of the service of the attachment, although at the time of entering judgment another instalment has become due. *Supreme Ct., Sp. T., 1860, Syracuse City Bank v. Coville, 19 How. Pr., 385.*
5. The goods seized upon the attachment are in the place of bail or security for the debt, and as creditors, by seizure, acquire an interest in or a lien upon the goods, they have all the rights and equities of special bail, and the lien of the attaching creditor cannot be increased to their detriment by tacking a claim accruing after the creditors have acquired their rights. The object of an attachment is to secure a debt actually due, and has no reference to a judgment which may, according to the practice of the court, be recovered as a security for a debt thereafter to become due. To warrant an attachment it must appear that a cause of action exists, and this cause is only for a sum actually due. (§ 229.) The plaintiff can claim no more, under his attachment, than he could have compelled the sheriff to take and hold. *Id.*
6. Notice of an attachment against all defendant's property, is insufficient under section 235 of the Code. *Wilson v. Duncan, Ante, 3.*
7. Though after judgment enjoining defendant, and pending his appeal therefrom, he acts at his peril in disregarding the injunction, yet if by giving proper security on the appeal, he has stayed plaintiff's "proceedings on the judgment," the court will not, pending such appeal, allow an attachment against him for contempt in disregarding the injunction. Such an attachment would be a proceeding on the judgment. *Howe v. Searing, Ante, 28.*

BOND; CONTEMPT; TAXES.

ATTORNEY.

1. The lien of the attorney for his compensation attaches to the claim itself, and exists from the commencement of the action to judgment, and the taxable costs are *prima facie* the measure of such compensation. *Supreme Ct., Sp. T., 1859, Keenan v. Dorfinger, 19 How. Pr., 153.*
2. If a defendant has *bona fide* paid the debt and costs to the plaintiff, and got a full discharge, without notice from the attorney of his claim,

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and without collusion to defraud him, it is valid, and a judgment taken by the attorney should be set aside on motion. If the adverse party applies to cancel the judgment by a set-off, the court would take care that the attorney's bill be paid. [3 Cai., 165.] A settlement of the debt, without receipt of the costs, stands precisely upon the same footing as the payment of both debt and costs to the client. *N. Y. Superior Ct., Sp. T.*, 1860, *McDowell v. Second Avenue Railroad Co.*, 4 *Bow.*, 670.

3. If an attorney has omitted to protect himself by a notice forbidding a settlement without him, and the parties compromise the action before judgment, of which he has notice, he then proceeds in the suit for his costs, at the peril of establishing conclusively that the adverse party had the design when making the settlement, of defeating his demand for the costs. If he fail in satisfying the court of this, his proceedings, subsequent to notice, will be set aside. *Ib.*
4. What amounts to collusion in such cases, considered. *Ib.*
5. Although stipulations made by the attorney, pertinent to the matters intrusted to him, are binding upon the client, though made without special authority; yet acts done outside of the matter committed to his charge are not binding,—*e. g.*, a stipulation not to appeal,—and where the attorney is unable to respond in damages, the court will relieve the client, preserving the other party from loss. The right of appeal cannot be taken away without the suitor's consent. So of a stipulation not to move for a second trial, under the statute, in an action for lands. *People and Taylor v. Mayor, &c., of New York*, *Ante*, 66.
6. Where an attorney appears for a person without authority, and suffers judgment against him, the person injured ought not to be confined to his remedy against the attorney, even though the latter be responsible. The court should in any case, give him leave to come in and litigate the case on the merits, preserving meanwhile the lien of the judgment. [6 Johns., 296; 1 Salk., 88; 9 Wend., 437; 9 How. Pr., 442.] *Superior Ct.*, 1860, *Ellsworth v. Campbell*, 31 *Barb.*, 134.
7. The statute of 1860—providing that any graduate of the Law School of Columbia College shall be admitted upon his diploma to practise—is not unconstitutional. On a fair construction, it has reference only to the requisite qualifications of learning and ability, and does not necessarily assume to dispense with the constitutional requirements as to age, sex, &c. *Matter of the Graduates*, *Ante*, 301.

BAIL; PROCESS.

ATTORNEY-GENERAL.

ATTORNEY-GENERAL.

1. That the attorney-general has no power to ratify proceedings taken in the name of the people without his consent. *People v. Mayor, &c., of New York*, 19 *How. Pr.*, 289.
2. The people, by the attorney-general, may bring an action to compel a chartered railroad company to keep its road in repair and in operation. *People v. Albany and Vermont Railroad Co., Ante*, 136.

AWARD.

ARBITRATION.

BAIL.

Under the Code of Procedure, as well as before, a practising attorney is disqualified from becoming bail; but such bail is not a nullity, but the objection must be raised by exception. [Doug., 466; 1 H. Blackst., 76; 2 Wm. Blackst., 799; Cowp., 828; 1 Chitt., 8; 1 Taunt., 164; 15 Johns., 535; 8 Ib., 327; 20 Ib., 129; 2 East, 181; 1 Wend., 35.] *N. Y. Superior Ct.*, 1859, *Miles v. Clarke*, 4 *Bosw.*, 632; affirming *S. C.*, 2 *Ib.*, 709.

BILL OF PARTICULARS.

A bill of particulars does not change the nature of the action. It is not a declaration, nor is it a novel assignment. Its office is to apprise the opposite party of the claim made against him, so that he may not be surprised at the trial; and an omission or mistake not calculated to mislead will be deemed immaterial. [4 Wend., 360; 2 Taunt., 224; 1 How. Pr., 172; 3 M. & S., 380; 8 Bing., 411; 10 Wend., 258; 3 Ib., 344.] Where the bill of particulars has not misled the opposite party, he cannot take advantage of it to exclude the offered proof. *N. Y. Superior Ct.*, 1859, *Seaman v. Low*, 4 *Bosw.*, 337.

BOARD OF HEALTH.

Requisites of an order of a board of health declaring a nuisance. *Rogers v. Barker*, 31 *Barb.*, 447.

BOND.

Under a bond in attachment proceedings, conditioned to pay all damages which the obligee might sustain, by reason of the issuing of the

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attachment, if the applicant failed to obtain judgment thereon—the adjudication of the justice does not finally determine whether the applicant fails to recover or not. [21 Wend., 270.] Though he is successful before the justice, if the other party has the judgment reversed upon certiorari, the costs of reversal are to be included in the damages. *Supreme Ct.*, 1857, *Bennett v. Brown*, 31 *Barb.*, 158.

JUDGMENT.

BROOKLYN.

1. Under section 8 of the Brooklyn sewerage and drainage act of 1857 (2 *Laws of* 1857, 100, ch. 521), providing that if the commissioners, in their plan of sewerage, find it necessary to construct a sewer through any street not opened by law, and it cannot be constructed without carrying it through a part of such street, the commissioners may take proceedings to have the street opened—an absolute or physical necessity is not contemplated. The commissioners' plan is for the entire city, and the commissioners are to be allowed a large discretion. *Kelsey v. King*, *Ante*, 180.
2. An action can be maintained in a State court for a tort committed upon one of its citizens within the limits of the Brooklyn Navy Yard. *Armstrong v. Foote*, *Ante*, 384.

CITY COURT OF BROOKLYN.

BURDEN OF PROOF.

EVIDENCE.

BURIAL GROUNDS.

RELIGIOUS CORPORATION.

CASE.

1. The settled practice requires that the lines of a proposed case be numbered, and that the amendments be proposed in detail; that they be written on the proposed case, or on a separate paper, with a reference specifying the line and page of the original; and that before the case and amendments are submitted for settlement, the place or passage where amendments are to be made or inserted be distinctly marked on the case submitted; and by the rules of 1858, No. 36, the party proposing a case or exceptions must examine the amendments and

CAUSE OF ACTION.

mark upon each his assent or objection. *N. Y. Superior Ct., Sp. T., 1859, Stuart v. Binse, 4 Bosw., 616.*

2. It is irregular to propose a substitute instead of amendments, or to propose striking out a large portion by a single amendment; though where a case proposed is so grossly inaccurate as to make it necessary, the court might grant leave to do so. *Id.*

CAUSE OF ACTION.

1. An action can be maintained for a breach of a covenant to continue a partnership for a fixed period unless sooner dissolved in accordance with the terms of the covenant. There do not seem to be any special rules of law applicable to covenants contained in partnership articles, and not to other covenants, and in general an action will lie for a breach of covenant, no matter in what instrument the covenant be found. No rule of law declares that a breach of a covenant contained in partnership articles shall be compensated only by nominal damages. The measure of damages must depend on the nature of the obligation, and the extent of the injury, in this as in all other cases of broken covenants. *Ct. of Appeals, 1853, Bagley v. Smith, 19 How. Pr., 1.*
2. Where the lease provided that the lessor should pay the value of the lessee's buildings, to be fixed by appraisal; and, by failure, to agree on appraisers, the valuation could not be affected,—*Held*, that the lessor could maintain an action to have his liability determined, and to be allowed to pay it. A court of equity has jurisdiction of such a case on the ground of protection to recognized rights which cannot be protected at law. *N. Y. Superior Ct., 1859, Reformed Protestant Church v. Parkhurst, 4 Bosw., 491.*
3. An individual taxpayer cannot, by suit, impeach the validity of a contract by the municipal corporation. *Kelsey v. King, Ante, 180.*
4. Whether tort is intended to be waived, must now be determined by the facts set out in the complaint. *Chambers v. Lewis, Ante, 216.*
5. If, on the employer's breach of his agreement to employ, the other party sue for the breach, and recover only one instalment of wages, he cannot subsequently bring another action for the same breach, and recover damages for the whole. The fact that the wrong measure of damages was applied in the former action does not entitle him to maintain a new one. If the party submits his claim to be passed on, the decision, though erroneous, is a bar, unless it is reversed or corrected in the same action. *Supreme Ct., 1860, Coburn v. Woodworth, 31 Barb., 381.*
6. Under the act of 1847 (575), an action can be maintained for causing

CERTIORARI.

the death of a married woman. The statute, in allowing the action, where it might have been maintained by the party, if living, does not refer to the party, in a technical sense, as the one whose name must be used upon the record. *Supreme Ct.*, 1859, *Green v. Hudson River R. R. Co.*, 31 *Barb.*, 260; affirming *S. C.*, 16 *How. Pr.*, 263.

CORPORATION; CREDITOR'S ACTION; ELECTION OF REMEDIES.

CERTIORARI.

1. The legitimate office of the common-law certiorari is to review and correct decisions and final determinations, not to divest the inferior jurisdiction of the right of terminating the proceedings, nor to withdraw from it the question to be tried. *Devlin v. Platt*, *Ante*, 398.
2. The main inquiry on certiorari relates to the power or jurisdiction of the inferior tribunal, and the question can only be determined by matters appearing in the record. *Ct. of Appeals*, 1860, *People v. Wheeler*, 21 *N. Y. (7 Smith)*, 82.

NEW YORK COMMON PLEAS, 2, 3.

CHATTEL MORTGAGE.

1. Actual notice to a judgment-creditor, of an existing mortgage, is not equivalent to filing. *Supreme Ct.*, 1858, *Stevens v. Buffalo*, and *New York City Railroad Co.*, 31 *Barb.*, 590.
2. That rolling stock of a railroad company is personal property, and a mortgage thereof must be filed as a chattel mortgage. *Stevens v. Buffalo and New York Railroad Co.*, 31 *Barb.*, 590; *S. P.*, *Beardsley v. Ontario Bank*, *Ib.*, 619.

CITY COURT OF BROOKLYN.

It seems, that the City Court of Brooklyn is a court of special and limited jurisdiction (*Laws of 1849*, 171, § 10; *Ib.*, 1850, 149, § 5), and is therefore incompetent to sit in the city of New York; and has no power to confer on a referee the power to try a cause out of its own jurisdiction. *Bonner v. McPhail*, 31 *Barb.*, 106.

APPEAL, 3, 4.

CLOUD ON TITLE.

A grantor who has no longer any interest in the land, cannot maintain an action to remove an apparent lien thereon, as being a cloud on the

COMMISSION.

title, on the ground that he agreed with his grantee that he would procure the lien to be discharged. *Townsend v. Goelet, Ante*, 187.

COMPLAINT, 13.

COMMISSION.

The court have no power to order the original instrument belonging to the plaintiff, and on which his action is brought, to be annexed to a commission to take testimony in another State, issued at the instance of the defendants, although they provide for first taking a photograph of the instrument at defendant's expense. *Supreme Ct.* (1860?), *Butler v. Lee*, 19 *How. Pr.*, 383.

COMMISSIONERS.

COMPENSATION.

COMMISSIONERS OF THE LAND OFFICE.

The power of the commissioners of the land office in reference to bringing suits, discussed. *People v. Mayor, &c.*, of New York, 19 *How. Pr.*, 289.

COMMITMENT.

1. A commitment for vagrancy should state that the person is a vagrant; but need not state all the particulars necessary to make out the offence. *Gray's Case, Ante*, 56.
2. A commitment issued by a coroner against a person charged with murder, is not void for the omission of the allegation that he caused the death "feloniously," if it is such that the fact that he caused the death feloniously may be collected on its face. *Matter of Collins, Ante*, 406.

HABEAS CORPUS; TAXES, 3.

COMMON PLEAS.

NEW YORK COMMON PLEAS.

COMPENSATION (FOR PRIVATE PROPERTY TAKEN FOR PUBLIC USE).

1. The provision of the Constitution (*Const. of 1846*, art. 1, § 7),—declaring that compensation for private property taken for public use

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"shall be ascertained by a jury of not less than three commissioners,"—means that compensation is to be ascertained by the meeting, investigation, and conference of all the commissioners, and by the report of a majority, in case all cannot agree; and hence a report signed by two of the three commissioners, the other dissenting, is sufficient. *Matter of Fourth Avenue, Ante*, 189.

2. The appropriation of land to public use as a street, confers a public right to use the same for the construction of a sewer in the middle of the street, and the owner is not entitled to additional compensation for the latter use. *Kelsey v. King, Ante*, 180.

COMPLAINT.

1. The complaint on a guaranty of a lease, alleged that the lease having been made and concluded, defendants afterwards covenanted. *Held*, after judgment, that this language was not conclusive on the question whether the guaranty was not executed simultaneously with the lease. *N. Y. Superior Ct.*, 1859, *McKensie v. Farrell*, 4 *Bosw.*, 192.
2. In an action where the setting aside of a release or account-stated is necessary to reach the relief sought, it is proper that the complaint should, after stating the original cause of action, set forth such defence, which it is anticipated defendant will interpose, with statements which avoid the defence. [17 N. Y., 270.] *N. Y. Superior Ct.*, 1859, *Wade v. Rusher*, 4 *Bosw.*, 537.
3. The objection that a plaintiff suing as receiver of a corporation does not show that his appointment was founded on a petition, does not apply where the receiver was appointed on consent of the corporation, in an action brought under section 40 of 2 Revised Statutes, 463. *Tuckerman v. Brown, Ante*, 389.
4. The complaint in an action brought by a bank in the name of the president did not contain any allegation to show that the bill had been negotiated to the plaintiff's bank, though the plaintiff named himself as president of the association. *Held*, that the intention to enforce a claim in favor of the bank was plain, and leave to amend on payment of costs was proper. *Ct. of Appeals*, 1860, *Van Duzer v. Howe*, 21 *N. Y. (7 Smith)*, 531.
5. In a complaint against an indorser, an allegation that the note was duly presented and payment demanded, but it was not paid, and due notice of non-payment was given, &c., is insufficient on demurrer. *Paquioque Bank v. Martin, Ante*, 291.
6. The only cases in which it is necessary, in order to sustain an action for defamation, to allege the manner in which the publication has

COMPLAINT.

- injured the plaintiff, are cases where it is of such a character that the court cannot see that its tendency and effect would be to defame or degrade the plaintiff, or to render him odious or contemptible. [2 Den., 299.] *Supreme Ct.*, 1860, *Perkins v. Mitchell*, 31 *Barb.*, 461.
7. In an action for fraudulent representations of the value of stock, whereby the plaintiff was induced to purchase it, although the complaint does not allege, in terms, that the defendant's representations were read by, or came to the knowledge of the plaintiff, yet if it alleges that she was induced by these representations to purchase the stock of the company, and in exchange for them to convey lands, it is sufficient. This involves the knowledge of the defendant's statements by the plaintiff, and connects her contract and subsequent loss with those statements as cause and effect. *So held*, on demurrer. *Supreme Ct.*, 1860, *Newbery v. Garland*, 31 *Barb.*, 121.
 8. In an action to charge the officers of a corporation with damages for making and publishing false representations as to the condition of the corporation, whereby plaintiff was induced to purchase stock, a general averment that they did so "with intent to deceive and defraud those who might become purchasers and owners of the stock;—" *Held*, sufficient on demurrer. *Supreme Ct.*, 1859, *Morse v. Swits*, 19 *How. Pr.*, 275.
 9. The complaint alleged the recovery of a judgment against B. for a sum named, and after stating facts showing the sheriff's liability for the escape of B., proceeded thus: "Wherefore the plaintiffs aver that said defendant, as such sheriff, became indebted to the said plaintiffs in the said sum of, &c., for the recovery of which this action is brought," and demanded judgment for that sum. *Held*, a clear indication that the plaintiffs sued under 2 Revised Statutes, 437, § 63, for the amount of the debt. *N. Y. Superior Ct., Sp. T.*, 1859, *McCreery v. Willett*, 4 *Bow.*, 643.
 10. In an action to recover damages for injuries to person or property, it is not necessary to aver in the complaint that the acts complained of did not occur through the negligence or carelessness of the plaintiff. The same rule applies to actions against a city or county, under the act of 1855, to recover for injuries done by a mob. *Wolfe v. The Supervisors of Richmond*, *Ante*, 270.
 11. In order to sue a stockholder of an incorporated company, it is not necessary to aver that the corporation was insolvent, except in those cases in which the charter places the liability subject to the existence of such insolvency, or requires the creditor to exhaust his remedy against the corporation before proceeding against the stockholders; in other cases, when a debt is not paid at maturity, the creditor may pro-

COMPLAINT.

- ceed to collect his claim either from the corporation, or those who by their charter are made responsible for the debts without any limitation. *Supreme Ct.*, 1859, *Perkins v. Church*, 31 *Barb.*, 84.
12. That the complaint in an action by the receiver of a mutual insurance company on a premium note must show the liabilities of the company. *Thomas v. Whallon*, 31 *Barb.*, 172.
 13. In the case of a mortgage upon real estate, the necessity of coming into a court of equity to have the instrument surrendered and cancelled upon the record, is sufficiently apparent without showing any reason, other than the fact that the mortgage has been executed and delivered, and placed upon record, if it is void for any cause not apparent upon its face. The statute authorizes such a proceeding without any qualification, and no court can fail to see that a successful defence to an action at law to recover the debt, would still leave the mortgage upon the record an apparent incumbrance. [16 *N. Y.*, 519; 5 *Ves.*, 604, 609; 7 *lb.*, 3.] *Supreme Ct.*, 1800, *Williams v. Ayrault*, 31 *Barb.*, 364.
 14. Hence, in an action to remove such a cloud, it is sufficient for the plaintiff to set out in his complaint, the execution and delivery of the mortgage upon his real estate in pursuance of an usurious agreement, and that the same was duly recorded, without any reference to the question of a defence at law. *Ib.*
 15. A complaint in an action to remove a cloud on title should not be dismissed at the trial on the mere ground that it does not in terms allege that plaintiff has title, and that the instrument he seeks to cancel is a cloud, if on a fair construction of the pleading, the facts are distinctly shown. *Ib.*
 16. A complaint in an action for separation from bed and board, which does not specify particularly the nature and circumstances of the complaint relied on, and set forth times and places with reasonable certainty, is bad on demurrer. *Anonymous*, *Ante*, 231.
 17. Form of a complaint in a creditor's action by numerous plaintiffs to set aside several distinct judgments, suffered in favor of, and transfers made to, numerous defendants, held sufficient on demurrer. *Morton v. Weil*, *Ante*, 421.
 18. Form of a complaint against directors of a corporation for fraudulent representations as to the capital and condition of the company, held sufficient on demurrer. *Harper v. Chamberlain*, *Ante*, 234.
 19. Facts occurring after suit brought cannot, under any circumstances, be incorporated into a complaint by way of amendment, nor can they be brought before the court by supplemental complaint, when the original complaint states no cause of action. No party can recover in

CONFESSION OF JUDGMENT.

an action which was commenced when the cause of action had not accrued. *N. Y. Superior Ct., Sp. T., 1859, McCullough v. Colby, 4 Bosw., 603.*

AMENDMENT, 4, 5, 7; PLEADING, 5.

CONFESSION OF JUDGMENT.

1. A statement for judgment by confession, that the indebtedness arose on a promissory note of specified date and amount, which note was given to parties named, for goods theretofore bought by defendant, which note was indorsed by the debtor, and came into the hands of the plaintiff for a valuable consideration—is insufficient. *Clafin v. Sanger, Ante, 338.*
2. There is no distinction, in respect to the particularity of statement required, between the case of a confession of judgment to the original creditor, and that of a confession to a subsequent owner of the demand. *Ib.*
3. A statement for judgment by confession, referring to a schedule annexed.
Held, insufficient, for not showing the necessary facts. Haman v. Keinhart, Ante, 132.

JUDGMENT, 11.

CONSTITUTIONAL LAW.

An admission of attorneys is not appointment to office within the meaning of the Constitution. *Matter of the Graduates, Ante, 301.*

CORPORATION, 1; COUNTY, 1; MUNICIPAL CORPORATION, 5; SUPREME COURT.

CONSTRUCTION.

1. Though, in general, words of reference relate to the last antecedent; when the sense of the writer shows that a subject placed earlier in the sentence is the one intended to be referred to, that construction will be adopted. *Ct. of Appeals, 1860, Judd v. O'Brien, 21 N. Y. (7 Smith), 186.*
2. An assignment by an insolvent debtor of his property to trustees for the benefit of creditors, will not be construed as authorizing them to sell the property upon credit, when its language is consistent with a different interpretation, which makes it legal and valid. [1 Kern., 302.]

CONSUL.

Ct. of Appeals, Wilson v. Robertson, 21 N. Y. (7 Smith), 587; S. C., 19 How. Pr., 350.

CONSUL.

That a consul is not required to answer in chief in order to procure the benefit of his exemption from suit in a State court. *Taaks v. Schmidt*, 19 How. Pr., 413.

CONTEMPT.

1. Where an order is made directing a party to deliver property to a receiver, an attachment for contempt will not issue because he refuses to do so on demand made by the plaintiff, his attorney, or the referee appointed to see that the delivery is made in the absence of the receiver. The demand, in such case, must be made by the receiver personally. *N. Y. Superior Ct.*, 1860, *Panton v. Zebbley*, 19 How. Pr., 394.
2. In an action to restrain the infringement of a trade-mark, one of the plaintiffs, when offered as a witness on their own behalf, as to the issue on the question of damages sustained by them by the infringement, refused to answer as to the materials with which his compound, which he sought to protect by the trade-mark, was prepared.
Held, that his claim for damages was properly stricken out as a penalty for contempt in refusing to answer, he not offering other testimony in support of it. *Burnett v. Phalon*, *Ante*, 17.
3. The proper practice on objecting to such interrogatories. *Ib.*

LIMITATIONS, 1; TAXES, 1.

CONVERSION.

Where property comes lawfully into the defendant's possession, to entitle the plaintiff to recover its value, it is necessary for him to show affirmatively a demand of it before suit brought and a refusal to deliver, or that the defendant had so disposed of the property, that it was not in his power to deliver it. [Gra. Pr., 89; 1 Johns. Cas., 406; 6 Johns., 44; 3 Blackst. Com., 152.] But a demand and refusal even is no evidence where it is apparent the defendant has made no conversion. [Buller's N. P., 44.] *N. Y. Com. Pl.*, 1859, *Powers v. Bassford*, 19 How. Pr., 309.

CORONER.

CORONER.

1. It is not necessary that a coroner, on holding an inquisition on the body of a person dead or wounded, should take the testimony of the witnesses in the presence of the accused. *Matter of Collins, Ante, 406.*
2. The accused, when brought before the coroner upon his process issued after an inquisition, has no right to require the examination of witnesses to establish his guilt or innocence. The process for the apprehension of the accused when not in custody, and the mittimus for sending him to prison, are based solely upon the inquisition. The coroner has no power to take testimony to establish the innocence of the prisoner, and then discharge him contrary to the finding of the jury. *Ib.*

CORPORATION.

1. A corporation cannot make a valid agreement with one who delivers to them securities to form a part of their original capital, and going to make up the amount of such capital required by law, that they will subsequently surrender the same for a less security, which will not meet the requirements of the law. Such an agreement is a fraud upon the law. *Tuckerman v. Brown, Ante, 389.*
2. The surrender and cancelling of such a security, in pursuance of the agreement, does not release the liability of the one who gave it to the corporation. To allow it to have effect would be to sanction a withdrawal of capital, contrary to section 1, of art. 1, tit. 2, chap. 18, part 1, of the Revised Statutes. *Ib.*
3. A corporation cannot become sureties, either as accommodation indorsers, or in any other form [26 Barb., 568; 3 Kern., 309], unless the note indorsed by them has been discounted in good faith, in consequence of representations made by its proper officers, or has passed into the hands of a *bona-fide* holder without notice, who has paid valuable consideration for it. *Supreme Ct., 1859, Bridgeport City Bank v. Empire Stone-Dressing Co., 19 How. Pr., 51.*
4. If the evidence is conflicting on these questions, the case must be submitted to the jury. *Ib.*
5. Under 2 Rev. Stat., 463, § 36,—providing that “whenever a judgment at law, or a decree in equity, shall be obtained against *any corporation*, incorporated under the laws of this State, and an execution issued thereon shall have been returned unsatisfied, in part or in whole, upon the petition of the person obtaining such judgment or decree, or his representatives, the Supreme Court may sequester the stock, prop-

COSTS.

- erty, things in action, and effects of such corporation, and may appoint a receiver of the same;"—the power of the receiver is not confined merely to the payment of the plaintiff's judgment; but he is authorized to proceed and act for all the creditors; but the court have the power, on payment of the plaintiff's claim and costs, and in the absence of any evidence to show that any other creditor has sought to avail himself of the benefits of the action, to order it to be discontinued, and the receiver to be discharged. *Supreme Ct., Sp. T., 1859, Angell v. Salisbury, 19 How. Pr., 48.*
6. The fact that the receiver has not given sufficient security is not ground for dissolving an injunction in such proceedings. *Ib.*
 7. Directors of a corporation, who issue unauthorized certificates of stock, are not liable directly to ultimate purchasers of the stock, who made no contract with them, and did not act on their representations. *Seizer v. Mali, Ante, 129; compare Morse v. Swits, 19 How. Pr., 275; Newbery v. Garland, 31 Barb., 121.*
 8. The directors of a corporation have no power to sell the entire movable property of the corporation, where this prevents the continuance of their business; and such a sale made by them, is void as against such stockholders as do not assent. *Abbot v. Hard Rubber Company, Ante, 204.*
 9. Of the right of a sequestrator of a corporation, not being appointed receiver, to sue. *Brinton v. Wood, 19 How. Pr., 162.*
 10. Of the liability of the trustees of a manufacturing corporation on their omission to make annual report. *Boughton v. Otis, 21 N. Y. (7 Smith), 261.*
 11. The creditors of a dissolved insolvent corporation have an equitable lien upon its assets, in the hands of another, for the payment of their debts. *Supreme Ct., 1860, Tinkham v. Borst, 31 Barb., 407; reversing S. C., 15 How. Pr., 204.*

COMPLAINT, 7, 8, 11, 12; HIGHWAYS, 3; INSURANCE COMPANIES; RAILROAD COMPANIES.

COSTS.

1. In an action on a note, brought against both maker and indorser, the maker put in a demurrer, and plaintiff had judgment for its frivolousness, severing the action, and proceeding against the indorser, who answered, and the plaintiff had judgment against him also.

Held, 1. That the plaintiff was entitled to only one bill of costs upon the entry of the judgment. Such a case is the case of several actions on one instrument within the meaning of section 304 of the Code,

COSTS.

although the severance was caused by the act of the defendants. The provision in that section, that only one "bill of costs shall be allowed," means shall be recovered—not merely that only one shall be collected, as under the Revised Statutes.

2. That on appeals from such judgments, plaintiff was entitled to full costs of both appeals, for the appeal is in the nature of a new action. [5 Paige, 530.] *Buffalo Superior Ct.*, Pratt *a.* Allen, 19 *How. Pr.*, 450.

2. When, in granting an order dismissing the complaint for plaintiff's neglect to proceed, leave is reserved to him to bring the cause to trial on payment of costs, the costs should include all the costs to which defendant is entitled up to that time. Bowles *a.* Van Horne, *Ante*, 84.
3. The cause went over the term on defendant's motion, and he was ordered to pay the costs of that term to be adjusted.

Held, that the clerk was right in including \$10 for costs subsequent to notice of trial and before trial. *N. Y. Superior Ct.*, Shanks *a.* Rae, 19 *How. Pr.*, 540.

4. Where the plaintiff obtains judgment under section 247 of the Code, upon a frivolous pleading of the defendant, he recovers costs as upon a trial. Such a judgment involves a judicial examination of the issues of law within section 252. *Buffalo Superior Ct.*, 1858, Pratt *a.* Allen, 19 *How. Pr.*, 450.
5. Where an action is commenced in a justice's court, and on a plea of title interposed by the defendant is discontinued, and an action for the same cause commenced in the Supreme Court, and the plaintiff obtains a verdict upon one cause of action, against one defendant only, recovering less than \$50, and fails against both defendants as to the other cause of action, the plaintiff must be allowed costs [Code, § 61] against both defendants, where there is no certificate of the court that title to real property came in question on the trial. [Code, § 61.] *Supreme Ct.*, *Sp. T.*, 1860, Blake *a.* James, 19 *How. Pr.*, 321.
6. The defence of license to do an act upon land does not involve a question of title within the sense of the provisions respecting costs. [3 Johns., 450; 18 Wend., 649.] Though it seems that it is otherwise where an easement is claimed. *Ct. of Appeals*, 1860, Rathbone *a.* McConnell, 21 *N. Y.* (7 *Smith*), 466.
7. An answer construed to set up only a license, and not a grant of an easement, within this rule. *Ib.*
8. If a wife who is plaintiff in an action for divorce discontinues it, or is defeated in it, and judgment is rendered against her, her husband is not liable for costs incurred by her therein. Phillips *a.* Simmons, *Ante*, 287.

COUNTER-CLAIM.

9. Where executors or administrators are substituted for a deceased defendant in a pending action, they are not entitled to presentation of the demand, under the provisions of 2 Revised Statutes, 88-90,—relating to referring claims against estates of deceased persons; and section 41 of that statute does not prevent plaintiff from recovering costs against them, if he continues the action and recovers judgment. *Tindal v. Jones, Ante, 258.*
10. Special application to the court for leave to enter judgment in such case is not necessary. *Ib.*
11. A receiver in supplementary proceedings, being authorized (*Laws of 1845, 91, ch. 112*) to sue on demands held by him as such, is within section 317 of the Code, and is not liable for costs, unless the court so order. *N. Y. Superior Ct., 1859, Marsh v. Hussey, 4 Bosw., 614.*
12. In what case a third party examined in supplementary proceedings is entitled to costs. *Anonymous, Ante, 108.*
13. In taxing costs in a cause, the prevailing party is entitled to include his disbursements for fees of the commissioner, by whom testimony was taken under a commission. *Dunham v. Sherman, Ante, 152.*
14. He is not entitled to include witness-fees, other than according to the rate prescribed by our statute, except on showing that the fees of witnesses, in the country where the commission was taken, were regulated by law, and attendance could not be compelled without payment accordingly. *Ib.*
15. He is not entitled to include the charges of a solicitor employed abroad. *Ib.*

AMENDMENT, 9-11; ATTORNEY, 1-4; TAXATION.

COUNTER-CLAIM.

1. A counter-claim, when established, must in some way qualify, or must defeat, the judgment to which a plaintiff is otherwise entitled. In a foreclosure suit, a defendant who is personally liable for the debt, or whose land is bounded by the lien, may probably introduce an offset to reduce or extinguish the claim. But where his personal liability is not in question, and where he disclaims all interest in the mortgaged premises, he cannot demand a judgment against the plaintiff on a note, a bond, or a covenant. *Ct. of Appeals, 1860, National Fire Insurance Co. v. McKay, 21 N. Y. (7 Smith), 191.*
2. A counter-claim must have belonged to defendant at the commencement of the action. *Chambers v. Lewis, Ante, 216.*
3. When the complaint is for a conversion, a demand against the plaintiff

COUNTY.

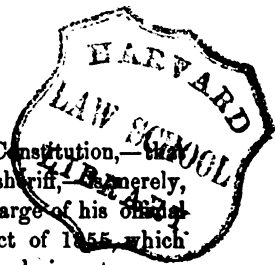
on a cause of action not connected with the same transaction, cannot be set up as a counter-claim. The fact that the summons in the action is in a form suited to an action on contract, instead of an action for a wrong, does not qualify the nature of the action. *Ib.*

4. In an action to recover possession of personal property delivered to defendant under a contract, defendant may set up, as a counter-claim, a lien arising in his favor by virtue of the same contract. There is no reason why, in an action for the possession of personal property, all the claims of either party against the other, arising out of the transaction set forth in the complaint, may not be determined, as well as in an action technically on contract. *Brown v. Buckingham, Ante, 387.*
5. But it is not enough to aver that the alleged counter-claim arose out of the transaction set forth in the complaint. The facts which show this to be so must be averred. *So held, on demurrer. Ib.*
6. In an action to recover possession of a pension certificate issued to the plaintiff, it is no defence, either legal or equitable, that the plaintiff left such certificate with the defendants as security for goods thereafter sold and delivered by them to him, relying on such security, and that there is a balance due to them for such goods. Such facts do not create a lien in defendant's favor upon the certificate, nor constitute a right to any relief in the action, and therefore do not constitute a defence or a counter-claim as defined by the Code. *N. Y. Superior Ct., Sp. T., 1859, Moffatt v. Van Doren, 4 Bosw., 609.*
7. A demand for conversion of personal property cannot be made a counter-claim in an action for rent. [4 E. D. Smith, 34.] *N. Y. Superior Ct., 1859, McKensie v. Farrell, 4 Bosw., 192.*

REPLY, 1.

COUNTY.

1. The object of the provision of art. 10, § 1, of the Constitution,—that the county shall not be answerable for acts of the sheriff,—is merely, that for any thing done by the sheriff in the discharge of his official duties, the county shall not be liable; and the act of 1855 which makes counties liable for injuries committed by a mob, is not repugnant to the Constitution. *Wolfe v. Supervisors of Richmond, Ante, 270.*
2. The liability imposed by that act is irrespective of any inability or neglect on the part of the sheriff. *Ib.*



COURT.

COURT.

Where any power is conferred upon a court of justice to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of the court may be regarded as *judicial*, irrespective of the original nature of the power. *Matter of the Graduates, Ante*, 301.

COURT OF SESSIONS.

1. It is the duty of the Court of Sessions to send to the Oyer and Terminer all indictments for offences which they cannot try; and they have power to send to that court any case which they can try, if they deem expedient. *People v. Shepard, Ante*, 59.
2. Two justices cannot legally hold a Court of Special Sessions in the city of New York. Three are necessary. *Divine's Case, Ante*, 90.

CREDITOR'S ACTION.

1. A creditor by attachment, but before judgment, cannot maintain a creditor's action. The provision of section 219 of the Code, allowing an injunction when it is made to appear that the plaintiff is entitled to the relief, and some part of the relief consists in restraining an act which, during the litigation, would injure plaintiff,—does not authorize an injunction to set aside a fraudulent lien upon property of the defendant, against which the plaintiff has obtained an attachment. *Brooks v. Stone, Ante*, 220.
2. The provision of the same section, that when the defendant, pending the action, does an act in violation of plaintiff's rights, respecting the subject of the action, he may be restrained by injunction,—does not apply to such a case. The property attached cannot be deemed the subject of the action. *Ib.*
3. The creditor's remedy in the courts of equity in this State to enforce a judgment against equitable property or interests, can only be resorted to after the remedy at law upon the judgment is duly exhausted by the return of an execution thereon unsatisfied. [2 Johns., 144, 283; 4 Ib., 671; 3 Barb. Ch., 46; 8 Barb., 593; 3 Kern., 161.] Such judgment must be recovered in this State; and this is so, even where a judgment recovered here would not be a lien on the property sought to be reached. *Supreme Ct.*, 1860, *McCartney v. Bostwick*, 31 Barb., 390.

CRIMINAL LAW.

4. A judgment recovered in a foreign State is not enough. *Ib.*
5. Although an execution has been returned at the direct instigation of the plaintiff or his attorney, yet if the action be to set aside a fraudulent assignment, and is not commenced until after or on the actual return-day, the action can be sustained. *So held*, where at the time of the delivering of the execution, and through the whole period of sixty days, the assignor (the debtor) and the assignee were under an injunction, prohibiting their application of any property to the payment of the creditor's demands. *N Y. Superior Ct.*, 1859, *Forbes v. Logan*, 4 *Bosw.*, 475.
6. The service of the summons and injunction in the creditor's suit, not the granting of the injunction, is the commencement of that suit within the rule that a creditor's action cannot be brought before the expiration of sixty days from the issue of execution. *Ib.*
7. Where the plaintiffs who are judgment-creditors, seek to obtain the debtor's property from persons to whom it was fraudulently passed away, they may unite such persons in one action, although such persons received the property in separate and distinct parcels. *Morton v. Weil, Ante*, 421 (*S. P.*, *N. Y. Superior Ct.*, 1859, *Wade v. Rusher*, 4 *Bosw.*, 537.)
8. In such case the cause of action is the same, viz., the fraudulent disposition of the debtor's property to the several defendants, although in several parcels. Hence it is an entire cause of action, affecting all the defendants, within section 167 of the Code of Procedure. *Ib.*

PARTIES, 5.

CRIMINAL LAW.

COMMITMENT; CORONER; COURT OF SESSIONS; HABEAS CORPUS; NEW TRIAL, 6; TRIAL, 1, 11.

DEED.

1. The deed of a sheriff, as well as a private deed, may be reformed by the court in a proper case. *Ct. of Appeals*, 1860, *Bartlett v. Judd*, 21 *N. Y.* (7 *Smith*), 200.
2. Of the execution and acknowledgment of a deed by a non-resident married woman. *De Pierre v. Thorn*, 4 *Bosw.*, 266.
3. A deed referring to a street, without describing its width, must be taken to intend the width of the street as laid out at the time of the execution of the deed, though it had not been opened to the full width. *Matter of Fourth Avenue, Ante*, 189.

 DEFAULT.

4. Of the effect of a release of a right to land used as a street, upon the dedication thereof. *Ib.*

DEFAULT.

A default allowed by one of several defendants while holding a substitution in his hands, in collusion with the plaintiffs, held a fraud upon the other defendants. *Supreme Ct., Sp. T., 1859, People a. Mayor, &c., of New York, 19 How. Pr., 289.*

DEFENCES.

1. Although the holder of a bill discounted it entirely on the faith of security provided by an indorser for its payment, and knowing that the drawer and acceptor were insolvent, he is not thereby compelled to resort to such security before recovering against the drawer or acceptor. *Lee Bank a. Kitching, Ante, 435.*
2. A plea of a suit pending for the same matter in a foreign State or country, is no bar to an action here, either in equity or at law. [4 Vea., 357; 3 Atk., 587; 1 Barb. Ch., 125; 9 Johns., 221; 12 *Ib.*, 99; 5 *How. Pr.*, 51; 5 *Sandf.*, 330.] *Supreme Ct., 1860, Williams a. Ayrault, 31 Barb., 364.*

ANSWER; CAUSE OF ACTION, 5; COUNTER-CLAIM.

DEMURRER.

1. A demurrer which specifies various grounds of objection to the sufficiency of the allegations of the complaint, without stating any one of the grounds specified in section 144 of the Code, is insufficient. *Harper a. Chamberlain, Ante, 234.*
2. In an action against husband and wife, concerning the separate property of the wife, and seeking no judgment against the husband, the husband is a proper party; and he cannot sustain a separate demurrer on the ground that the complaint states no cause of action against him, even though the complaint is insufficient as against the wife. *Supreme Ct., Sp. T., 1860, Goelet a. Gori, 31 Barb., 314.*
3. A demurrer to a complaint in an action for defamation is not to be sustained on the ground that the communication was privileged, as being testimony in a legal proceeding, unless it appears by the complaint either that the proceeding was without jurisdiction, or that the testimony was compulsory. *Supreme Ct., 1860, Perkins a. Mitchell, 31 Barb., 461.*
4. A demurrer to the whole complaint,—*Held*, properly overruled if the

DISCHARGE.

complaint could be sustained in either of two aspects which it presented. *Newbery v. Garland*, 31 *Barb.*, 121.

PARTIES, 3; DEPOSITION; COMMISSION; COSTS, 13-15.

DISCHARGE.

1. An objection to the validity of a discharge in insolvency, whether on the ground of want of jurisdiction or otherwise, cannot be raised on a collateral motion—*e. g.*, in opposition to the debtor's motion to set aside an execution, on the ground of his discharge. *Rich v. Salinger*, *Ante*, 344.
2. The proper mode of testing the discharge in such case, is to sue upon the judgment instead of issuing execution. *Ib.*

DISMISSAL OF COMPLAINT.

1. The fact that defendant has actually noticed the cause for trial, does not preclude him from moving to dismiss the complaint for unreasonable neglect on the part of plaintiff to proceed. *Bowles v. Van Horne*, *Ante*, 84.
2. What is such unreasonable neglect. *Ib.*

DIVORCE.

1. The husband had, before marriage to his present wife, who now sought a divorce, represented to her that his former wife was deceased, whereas, in truth, she was living, he having been divorced from her.
Held, that these representations, even if fraudulent, and though the plaintiff would not have married him if she had known the truth, were not ground for granting her a divorce. *Clarke v. Clarke*, *Ante*, 228.
2. A decree declaring a marriage contract void, cannot be granted on a complaint which demands no other relief than a separation from bed and board, unless the defendant has answered. *Anonymous*, *Ante*, 231.
3. The provision of 2 Rev. Stat., 145, § 42, subd. 4,—that a divorce may be denied where the complainant has been guilty of adultery, under such circumstances as would entitle the defendant to a divorce,—does not refer to the circumstances mentioned in section 38, as giving the court jurisdiction, but to circumstances of guilt mentioned in section 42, subd. 1, or some of them. *Supreme Ct., Sp. T.*, 1860, *Leseuer v. Leseuer*, 31 *Barb.*, 330.

ANSWER, 11.

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DOMICIL.

DOMICIL.

The law of domicile discussed. *Hegeman v. Fox*, 31 *Barb.*, 475; *Ludlam v. Ludlam*, *Ib.*, 486.

ELECTION OF REMEDIES.

1. In the case of an executed contract, if one party has been defrauded, he may, at his election, repudiate the transaction within a reasonable time, and restoring what he has received, compel the other to restore; or he may treat it as valid, and bring his action for damages for the fraud; and the latter he may do at any time within the statute of limitations. *Supreme Ct.*, 1857, *Ilion Bank v. Carver*, 31 *Barb.*, 230.
2. What is an executed contract within the meaning of this rule. *Ib.*
3. Of the election of remedies on a breach of a contract to employ. *Colburn v. Woodworth*, 31 *Barb.*, 381.
4. Where one who is intrusted with property misapplies it, if the creditor, instead of suing for the conversion, proceeds upon the contract, and recovers judgment thereon, he waives all claim of title to the property and its proceeds. *Bank of Beloit v. Beale*, *Ante*, 375.
5. In cases of accession or commixtion, if the article retains substantially its original form and nature, possession may be reclaimed. *N. Y. Superior Ct.*, 1859, *Wilson v. Nason*, 4 *Bosw.*, 155.

ESCAPE.

SHERIFF.

EVIDENCE.

1. Under the old practice, facts in mitigation, though not a full answer, might be given in evidence under a plea of *non est factum*. [2 *Hill*, 194; 23 *Wend.*, 293; 21 *Ib.*, 277.] *Supreme Ct.*, 1831, *Bennett v. Brown*, 3 *Barb.*, 158.
2. On the trial of an action to recover possession of personal property, the defendant's counsel, for the purpose of showing the value of the goods, read to the jury the affidavit of the plaintiff on which proceedings of claim and delivery had been taken in the action.

Held, that by introducing it in evidence, they put it in the power of the plaintiff to read it all, because it must all be taken together, being the declaration under oath of the plaintiff; and the plaintiff's counsel might refer to it to show that the plaintiff was the owner of the prop-

EXAMINATION OF PARTIES.

- erty described in it. *Supreme Ct., Sp. T.*, 1860, Gardner *a.* Ryerson, 19 *How. Pr.*, 108.
3. In an action for an assault and battery committed in the absence of witnesses, ill-will on the part of the defendant towards the plaintiff is admissible as a part of the 'circumstantial evidence to determine by whom the assault was committed. [8 *Cow.*, 226.] *Ct. of Appeals*, 1860, Jewett *a.* Banning, 21 *N. Y. (7 Smith)*, 27.
 4. That in an action for diverting a water-course, proof of a diversion throws the burden of proof upon the defendant to justify it. Haight *a.* Price, 21 *N. Y. (7 Smith)*, 241.
 5. Of the burden of proof respecting alterations appearing in a public document produced by an official custodian. People *a.* Minck, 21 *N. Y. (7 Smith)*, 539.
 6. The mode of proving a patent granted by the British Government. McKinneron *a.* Bliss, 31 *Barb.*, 180.
 7. The rules of evidence in respect to a deed not acknowledged previous to delivery, nor attested by witnesses. Genter *a.* Morrison, 31 *Barb.*, 155.
 8. The amount of past profits is competent evidence to be considered in estimating prospective profits. *Ct. of Appeals*, 1853, Bagley *a.* Smith, 19 *How. Pr.*, 1.
 9. Of the requisite evidence to charge factors with a breach of duty or instructions. Milbank *a.* Dennistown, 19 *How. Pr.*, 126.
 10. Of the requisite evidence of negligence in an action for injury to the person. Bernhardt *a.* Rensselaer and Saratoga Railroad Co., 19 *How. Pr.*, 119; Ernst *a.* Hudson River Railroad Co., *Ib.*, 205; McGrath *a.* the same, *Ib.*, 211.

EXAMINATION OF PARTIES.

1. The defendant was examined as a witness in his own behalf on the trial. At the time the trial was had, he could not, by law, testify in his own behalf without giving at least ten days' previous notice of his intended examination. The paper served, which was at the trial held to be a notice of his intended examination, was not signed by him or his attorney. *Held*, that such paper was not a notice. It was only a memorandum. [17 *How. Pr.*, 192.] And the error in allowing him to testify in his own behalf without any sufficient notice being given of his intended examination, entitled the plaintiff to a new trial. *Supreme Ct.*, Demilt *a.* Leonard, 19 *How. Pr.*, 182.
2. The provision of section 399 of the Code,—that a party shall not be examined as a witness, unless the adverse party or person in interest

EXCEPTION.

is living,—does not exclude a party from being a witness when the opposite party is a corporation. *Supreme Ct.*, 1859, *Johnson a. McIntosh*, 31 *Barb.*, 367.

3. *It seems*, that under section 399 of the Code, a landlord is not a competent witness for himself in "summary proceedings to recover the possession of land."* *Marseilles a. Bulger*, 19 *How. Pr.*, 34.

CONTEMPT, 2; SURROGATE'S COURT, 4; TRIAL, 5-7.

EXCEPTION.

1. A general exception is not to be sustained unless all the rulings are erroneous. *Supreme Ct.*, 1857, *Cronk a. Canfield*, 31 *Barb.*, 171.
2. *It seems*, that a refusal to adjourn to enable either party to obtain further testimony, cannot be made the subject of an exception. *Holbrook a. Wilson*, 4 *Bosw.*, 64.

EXECUTION.

1. A stipulation in a note, or other obligation, that the obligor would waive exemption of his property from execution, is void. [9 *How. Pr.*, 458.] *Supreme Ct.*, 1857, *Kneetle a. Newcomb*, 31 *Barb.*, 169.
2. Under the provision of 2 Revised Statutes, 368, § 36,—requiring that the time and place of holding any sale of real estate pursuant to any execution, shall be publicly advertised previously for six weeks successively, as follows: 1. A written or printed notice thereof shall be fastened up in three public places in the town where such real estate shall be sold. 2. A copy of such notice shall be printed once in each week, in a newspaper of such county, if there be one,—since the second subdivision requires a publication in the newspaper of a *copy*, it implies that the publication is to be commenced after the posting, and the publication is regular if the original is posted up six weeks, and a copy is, during the six weeks, published weekly, six times, although the full period of six weeks does not elapse after publication commenced, and before the sale. [7 *Barb.*, 39; 1 *Seld.*, 497; 1 *Mass.*, 255.] *Ct. of Appeals*, 1860, *Olcott a. Robinson*, 21 *N. Y.* (7 *Smith*), 150.
3. That rolling stock of a railroad company is personal property, and leviable as such on execution. *Beardsley a. Ontario Bank*, 31 *Barb.*, 619 (S. P., *Stevens a. Buffalo and New York Railroad Co.*, *Id.*, 590).

* Otherwise now by the *Laws of 1860*, 787, ch. 459, § 12.

EXECUTORS AND ADMINISTRATORS.

4. The effect of a chattel mortgage on the rights of the parties, as respects the liability of the mortgaged property to levy on execution against either of them. *Hall v. Samson*, 19 *How. Pr.*, 481.
5. After an order of arrest has been discharged on motion, the defendant is not liable to arrest on execution against the person, though on his default at the trial a special verdict is found, stating that he was guilty of the fraud charged in the complaint. *Stelle v. Palmer*, *Ante*, 62.
6. On appeal from an order denying defendant's motion to vacate an order for his arrest, the order was reversed on condition that he stipulate not to sue for the arrest; but if he should not, the order was affirmed;—and he did not accept the condition. *Held*, that the affirmation was conclusive on his subsequent motion to set aside an execution against his person; and the court would not review the order on the ground that such condition was oppressive. *Edgerton v. Ford*, *Ante*, 415.

EXECUTORS AND ADMINISTRATORS.

1. An administrator who makes a claim against the estate, must support it by a sworn voucher, such as he may require under section 35 of the statute relating to payment of debts and legacies, and it is error for the surrogate to allow his claim, whatever the force of the proof, unless so verified. [6 Paige, 166; 8 Ib., 152; Dayt. Surr., 478.] *Supreme Ct.*, 1860, *Terry v. Dayton*, 31 *Barb.*, 519.
2. The object of the act of 1847 (*Laws of 1847*, 88), was not to confer upon executors and administrators powers which otherwise they would not possess, but to afford them additional protection, when acting in good faith in the exercise of their common-law powers. Although they could compromise a claim, or compound a debt, without the aid of the statute, still they might perhaps be held responsible for any serious error in judgment, in so doing. The act in question enables them to obtain the sanction of the judgment of the surrogate in addition to their own, and this affords them additional protection, if their conduct is fair and honest. *Ct. of Appeals*, 1860, *Chouteau v. Suydam*, 21 *N. Y.* (7 *Smith*), 179.

COSTS ; SURROGATE'S COURT.

FORECLOSURE.

1. Under the statute requiring the notice in the case of a foreclosure by advertisement, to state the date of the mortgage, and where recorded

FORMS.

- (2 *Rev. Stat.*, 546, § 4)—a notice giving the clerk's office and the date of recording correctly, though with an error in the number of the book, is a substantial compliance with the requirement of the statute. The place where recorded would be sufficiently indicated by naming the office and the date of the record, and possibly by the mention of the office alone. *So held*, where there was no book in the office of so high a number as the one designated. *Ct. of Appeals*, 1860, Judd *a. O'Brien*, 21 *N. Y.* (7 *Smith*), 186.
2. An error in the notice stating the amount due on the day before publication, instead of on the day of publication,—*Held*, not material. *Id.*
 3. The considerations which govern a court of equity in allowing a receiver of rents and profits in foreclosure cases before sale. *Syracuse City Bank a. Tallman*, 31 *Barb.*, 201.

FORMS.

COMPLAINT, 17, 18.

GUARDIAN AD LITEM.

The want of a verification by an infant defendant to his petition for the appointment of a guardian *ad litem*, may be allowed to be supplied after judgment; and, *it seems*, that the court may dispense with such verification. *Van Wyck a. Hardy*, *Ante*, 473.

AMENDMENT; PARTITION, 1; SERVICE, 2.

HABEAS CORPUS.

1. Upon habeas corpus the prisoner may impeach the commitment, by showing that the court which made it was not legally constituted—*e. g.*, that one of the justices named as present, was in fact absent. *Divine's Case*, *Ante*, 90.
2. The practice of reviewing commitments upon habeas corpus is not to be encouraged. *Gray's Case*, *Ante*, 56.

HIGHWAYS.

1. The privileges incidental to the use of property taken for public use as a highway. *Kelsey a. King*, *Ante*, 180.
2. Notice of hearing before the commissioners, not necessary under the Long Island Counties Act. *People a. Smith*. 21 *N. Y.* (7 *Smith*), 595.

INJUNCTION.

3. Of determining the residence of corporations in assessing highway taxes. *People v. Pierce*, 31 *Barb.*, 138.

INJUNCTION.

1. The court will not interpose by injunction to prevent a party from prosecuting summary proceedings to recover possession of land, where the complainant had a perfect defence to their proceedings before the justice, and does not show that he had not evidence to prove such defence, and no fraud or abuse is shown. *Seeback v. McDonald*, *Ante*, 95.
2. In general, an injunction should not be granted to restrain the execution of summary proceedings to recover possession of land, except in case of undue advantage, fraud, or surprise, to which the landlord is a party. *Marks v. Wilson*, *Ante*, 87.
3. A railroad company may be compelled to continue their business by an injunction forbidding them to discontinue it. *People v. Albany & Vermont Railroad Co.*, *Ante*, 136.
4. Such an injunction may be granted at the suit of the People, if it is not shown that the discontinuance is necessary to avoid pecuniary loss. *Ib.*
5. In an action by a stockholder to set aside a sale of the entire property of the corporation, an injunction should be granted, and a receiver should be appointed. *Abbot v. The Hard Rubber Co.*, *Ante*, 204.
6. An injunction will not lie to eject a clergyman from his possession of the church, and to forbid his preaching in it, when he is rightfully in office by the act of the parish, and there is no other person who claims the office, or with whose rights as a minister of the parish he is interfering, and where there is no occasion for a breach of the peace, or a conflict between two clergymen or their adherents in the conduct of the worship of the congregation. *Supreme Ct.*, 1859, *Youngs v. Ransom*, 31 *Barb.*, 49.
7. The vendor of city lots required from the purchaser a covenant against the erection of any livery stable, &c., on the premises sold, and on his own part covenanted that no more than two houses should be erected on the residue of the land owned by him.
Held, that the purchaser was entitled to an injunction restraining the vendor from erecting a livery stable on the residue. *Schenck v. Campbell*, *Ante*, 292.
8. In such a covenant, the word house may be understood as meaning dwelling-house. *Ib.*
9. After the mortgage-debt was over due, the mortgagor sent the mort-

INSANE PERSONS.

gatee a draft for a part of the debt, saying he might use the draft if he would extend the time of payment of the residue for one year.

Held, that the mortgagee having accepted the money, but refused to be bound by the condition, the mortgagor might maintain an action to restrain foreclosure of the mortgage. He was not to be restricted to an action for damages. *Supreme Ct., Sp. T.*, 1860, *Grinnan v. Platt*, 31 *Barb.*, 328.

10. A suit cannot be maintained in the courts of this State to enjoin and restrain the prosecution of an action commenced and pending in a court of a sister State. [2 *Paige*, 402; 2 *Barb. Ch.*, 276; 4 *Cranch*, 179; 7 *Ib.*, 279; 2 *Lead. Eq. Cas.*, pt. 2, 109.] *Supreme Ct.*, 1860, *Williams v. Ayrault*, 31 *Barb.*, 364.
11. The court will not interfere to protect a party in the use of trade-marks which are employed to deceive the public, and to deceive them by fraudulent representations contained in the labels and devices which are claimed to constitute wholly or in part such trade-marks. *N. Y. Superior Ct.*, 1860, *Hobbs v. Francais*, 19 *How. Pr.*, 567.

CORPORATION, 6; CREDITOR'S ACTION, 2.

INSANE PERSONS.

1. The appointment of a stranger as committee of a lunatic without request of the relatives and next of kin of the lunatic, and without a reference, and without notice to persons prospectively interested in the estate, is not authorized by the practice of the court. *Lamoree's Case*, *Ante*, 274.
2. It is no objection to the appointment of a person who is a resident of the State, and within its jurisdiction, that he is not a resident of the county, in the County Court of which the proceedings are had. *Ib.*
3. The finding and confirmation of an inquisition on a writ *de lunatico inquirendo*, should not be set aside for mere irregularity, where there is no room whatever for doubt of the lunacy of the person concerned. *Ib.*

INSURANCE COMPANIES.

1. Notes given to an insurance company, under section 5 of the general law, are absolute and payable at all events without an assessment. They are not contingent on the happening of losses. *Tuckerman v. Brown*, *Ante*, 389.
2. Hence, when there are two departments in a company,—one stock and one mutual,—it is no defence to a note given on insurance in the

INTERPLEADER.

mutual department, that all the losses in that department have been paid, and that the unpaid losses accrued in the other department. *Ib.*

INTERPLEADER.

Of the grounds on which an order of interpleader may be granted under the Code. *Wilson v. Duncan, Ante, 3.*

IRREGULARITY.

1. Questions of irregularity are to be settled in the action wherein they arise, unless questions of jurisdiction are involved. *Supreme Ct., Sp. T., 1860, Battershall v. Davis, 31 Barb., 325.*
2. A party who means to avail himself of an irregularity in the progress of a cause, must make his objection in due season, and before the other side has compromised itself by his silence, and a person upon whom the law has cast an interest in an estate, which is the subject of a suit in the courts for a sale and partition, must abstain from becoming an actor in the proceedings, if he designs at some future time to assert his title upon the ground that he was not made a party, and therefore not included by the judgment or decree. *Supreme Ct., Sp. T., 1860, Regua v. Holmes, 19 How. Pr., 430.*

JUDGE.

The statute disqualifying judges under certain circumstances, does not apply to highway commissioners. An act of public administration, though requiring the exercise of judgment, is quite a different thing from the dispensing of justice between man and man. Moreover, the applicant to the commissioners in highway proceedings is not "a party" within the statute. *Ct. of Appeals, 1860, The People v. Wheeler 21 N. Y. (7 Smith), 82.*

JUDGMENT.

1. In an action against three persons, as partners, one not being served with the summons, nor appearing, the plaintiff is entitled to judgment against the other two, upon evidence that they alone constituted the partnership. The words "defendants severally liable," in subd. 2, § 136 of the Code, mean defendants liable separately from the defendants not served, though jointly as respects each other. *Ct. of Appeals, 1860, Pruyn v. Black, 21 N. Y. (7 Smith), 300.*
2. The common-law rule, that in an action for the breach of a contract,

JUDGMENT.

against two or more defendants, a verdict or judgment could not be given against one or more of them without the others, has been changed by the Code. *Ib.*

3. Under the Code, it is not necessary that the plaintiff, who declares against two upon an alleged joint contract, should establish a joint liability, or fail in his action. [1 Kern., 294.] The common-law rule is altered by the Code, and now, under sections 274 and 136, judgment may be had against the defendant who is shown to be liable, although proof is not given that is sufficient to charge his co-defendant, if the case proved is one in which the defendant would have been liable if sued alone. [5 Duer, 327]. *N. Y. Superior Ct.*, 1859, *McKensie v. Farrell*, 4 *Bosw.*, 192.
4. Proper practice on taking judgment on a bond for an absolute sum in instalments, of which part are not due. *Syracuse City Bank v. Colville*, 19 *How. Pr.*, 385.
5. A judgment dismissing the complaint without prejudice to a new action, cannot be amended on motion by giving leave to serve a new complaint in the same action. *So held*, where, by the limitation of the cause of action, no new action could be brought. *New York Ice Company v. Northwestern Insurance Company*, *Ante*, 419.
6. A judgment in an action for the possession of personal property is not void because it is not in the alternative, but absolute for the payment of money. Its regularity cannot be questioned collaterally. *N. Y. Superior Ct.*, 1860, *Gallarate v. Orser*, 4 *Bosw.*, 94.
7. If a judgment is based upon the fact that a former judgment is conclusive upon the parties, it should be set aside on motion when the former judgment has been set aside. *The People and Taylor v. Mayor, &c.*, of New York, *Ante*, 66.
8. After an action against a physician for damages for malpractice was pending, he sued the plaintiff therein, before a justice, for the same services in which the alleged malpractice was committed, and the latter set up as his defence the alleged malpractice, but subsequently withdrew it, and the justice, without taking it into consideration, gave the physician judgment for his services.
Held, that this judgment was a bar to the action for malpractice. The question of malpractice, though not actually litigated, was necessarily determined in the suit before the justice. *Supreme Ct.*, 1860, *Bellinger v. Craigie*, 31 *Barb.*, 534.
9. After an agent intrusted with money for the purchase of merchandise, converted the merchandise, the owner, with knowledge of the fact, sued him to recover the amount with interest, and had judgment, on which he charged the debtor in execution.

JUDICIAL SALE.

Held, that the judgment and execution estopped the plaintiff therein from claiming the property or proceeds, and that payment to him was no defence against the claim of the party to whom the agent had transferred the property. *Bank of Beloit v. Beale, Ante, 375.*

10. When a transcript of a judgment recovered in the Marine or in a Justice's Court has been filed in the county-clerk's office, the court where the judgment was recovered can no longer issue execution, but the judgment must be enforced by an execution in the Court of Common Pleas alone. *Martin v. Mayor, &c., of New York, Ante, 295.*
11. A judgment confessed by two of three partners as collateral security for a partnership debt, is a lien upon the interest of those two in the partnership property, and entitled to priority to that extent over subsequent judgments against all the partners. *Supreme Ct., 1859, Stevens v. Bank of Central New York, 31 Barb., 290.*
12. The proceedings of a Board of State Auditors,—*Held*, judicial. *State of Michigan v. Phoenix Bank, 4 Bosw., 363.*
13. Whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such application must be regarded as *judicial*. *Matter of the Graduates, Ante, 301.*
14. On an application by the comptroller to the Common Pleas to open a judgment against the city, recovered in the Marine Court, the proper course is to enjoin the plaintiff from proceeding, without prejudice to his right to sue on the judgment in a court of record. *Martin v. Mayor, &c., of New York, Ante, 295.*
15. Judgment in the case of the Washington Market grounds, in the city of New York, entered under peculiar circumstances,—*Held*, collusive. *People v. Mayor, &c., of New York, 19 How. Pr., 289.*

AMENDMENT ; MOTION, 6 ; NEW YORK MARINE COURT.

JUDICIAL SALE.

In selling lands under their own decree, the Court of Chancery may be regarded as the trustee for the owners and parties in interest. And where persons appeared in the action in which the decree was rendered, representing themselves as parties thereto, and entitled to be heard, and the court applied the proceeds of the sale to such uses as they directed, they, and persons claiming under them, must be deemed to have adopted, ratified, and affirmed the sale, and all that the Court of Chancery did in the premises. [6 Hill, 4 ; 3 Comst., 511 ; 8 Wend., 483 ; 3 Hill, 215.] *Supreme Ct., Sp. T., 1860, Requa v. Holmes, 19 How. Pr., 430 ; qualifying S. C., 16 N. Y. (2 Smith), 193.*

JURISDICTION.

JURISDICTION.

1. The courts of the State of New York have jurisdiction of actions for personal torts committed upon citizens of the State of New York, outside the territorial limits of the State. *Armstrong v. Foote, Ante, 384.*
2. Where a fund exists in this State, which our own citizens are entitled to have applied to the payment of their debts, the courts will detain and appropriate the fund, although the persons holding it may be accountable to a foreign jurisdiction in reference to it. The court will not, in such case, disregard the rights of other parties, but it will ascertain them and apply that portion which, after such investigation, is found to belong to our own citizens. *Supreme Ct., 1860, Tinkham v. Borst, 31 Barb., 407; reversing, in part, S. C., 15 How. Pr., 204.*
3. The Supreme Court has power in a proper case to decree a mortgage upon real estate void for usury, and to compel the party holding it to surrender it up to be cancelled, although the lands mortgaged lie in another State. [2 Paige, 606; *Ib.*, 402; 3 Sandf. Ch., 185; 6 Cranch, 148; 2 Lead. Eq. Cas., part 2.] *Supreme Ct., 1860, Williams v. Ayrault, 31 Barb., 364.*
4. The provision of 2 Revised Statutes, 173, § 37,—directing that the Court of Chancery must dismiss every suit concerning property where the matter in dispute, exclusive of costs, does not exceed the value of one hundred dollars,—is not abrogated, but by the judiciary act was applied to the Supreme Court, and has the effect of depriving that court of equitable jurisdiction in such cases. *Marsh v. Benson, Ante, 241.*
5. That a State may bind itself by submitting to the jurisdiction of a tribunal. *State of Michigan v. Phoenix Bank, 4 Bosw., 363.*

SURROGATE'S COURT.

JURY.

TRIAL, 1.

JUSTICES' COURTS.

1. The rule, that under the Code a defendant not pleading or giving notice of the non-joinder of a party cannot raise that objection, applies

LACHES.

- to justices' courts. *Supreme Ct.*, 1857, *Abbe v. Clark*, 31 *Barb.*, 238.
2. The rejection of evidence offered on the summing-up is wholly in the discretion of the justice. *Supreme Ct.*, 1859, *Heidenheimer v. Wilson*, 31 *Barb.*, 636.
 3. Where a cause before the justice of the peace is submitted by the counsel, at the close of the evidence, with an agreement that within the four days in which the court is to render judgment, they will appear before the justice and argue the cause, the case is in effect postponed for a final hearing; and if on the fourth day, counsel appear before the justice and argue the cause, he has power with or without the consent of the parties, to take four days from that time for the decision of the cause. *Ib.*

NEW YORK DISTRICT COURT; NEW YORK MARINE COURT.

LACHES.

LIMITATIONS, 2.

LIMITATIONS.

1. The provision of the statute of limitations, 2 Rev. Stat., 2 ed., 224 (22),—that all actions against sheriffs and coroners upon any liability incurred by them by the doing of any act in their official capacity, or by the omission of any official duty, except for escapes, shall be brought within three years after the cause of action shall have accrued, and not after that period,—applies in its spirit and intent to proceedings as for contempts to enforce civil remedies against such officers. *Supreme Ct.*, 1860, *Van Tassel v. Van Tassel*, 31 *Barb.*, 439.
2. The failure of the officer to pay over moneys collected, &c., is always within the knowledge of those interested, if they will inquire; and hence if they omit to inquire, they are not free from laches; and their ignorance does not prevent the statute from running. *Ib.*
3. The provisions of 2 Revised Statutes, 302, § 52,—requiring bills for relief to be filed within ten years after the cause thereof shall accrue,—construed in their application to the case of a defendant interposing a demand for such relief. *Bartlett v. Judd*, 21 *N. Y. (7 Smith)*, 200.

LUNATIC.

INSANE PERSONS.

MANDAMUS.

MANDAMUS.

1. The court will not grant a mandamus to compel the Common Council of a Municipal Corporation to confirm the award of a contract to the lowest bidder therefor. The Common Council have power to reject the lowest bid, in the exercise of a sound discretion, and the court will not interfere with its exercise. *People on rel. Lynch v. Aldermen of New York, Ante, 289.*
2. Mandamus granted to compel the approval of official bonds, in order to enable the appointee to bring an action to try the title to the office. *People and Platt v. Stout, Ante, 17.*
3. Of the cases in which the imposition of a tax may be compelled by mandamus. *People on rel. The Commissioners of Records v. Supervisors of New York, Ante, 114.*
4. To a mandamus requiring inspectors of election to return whether the relators did not receive the greatest number of votes, and whether they did not declare them duly elected, a return that they were not duly elected by the greatest number of votes is evasive, and should be quashed on motion. *People on rel. Hart v. White, Ante, 168.*
5. A suit, by claimants to office, for an injunction to prevent adverse claimants from acting as officers, is no bar to a mandamus to obtain certificates of election. *Id.*

MOTIONS AND ORDERS.

1. Motion for an attachment denied on the ground that an attachment in another court, between the same parties, and on the same facts, had been vacated. *Schlemmer v. Myerstein, 19 How. Pr., 412.*
2. If one of several defences set up in an answer is insufficient, it may be struck out on motion, though it might also have been reached by a demurrer. *Lee Bank v. Kitching, Ante, 435.*
3. The discretion exercised by the court at general term in imposing a stipulation not to sue for false imprisonment, &c., as a condition of vacating an order of arrest, is not to be reviewed by the court below, or in another proceeding at a subsequent general term. *Edgerton v. Ford, Ante, 415.*
4. To secure the right to be heard on a motion for a new trial on a case, a stay of proceedings must be procured, or an order obtained, that judgment, if entered, be entered not absolutely, but as security merely. [3 Duer, 669.] If the judgment entered be absolute and unconditional, the party loses his right to be heard on a case. *N. Y. Superior Ct., 1859, Anthony v. Smith, 4 Bosw., 503.*

MUNICIPAL CORPORATION.

5. Motion to set aside a nonsuit cannot be made unless it appears by the case that the trial was with a jury. *Supreme Ct.*, 1857, Cronk *a.* Canfield, 31 *Barb.*, 171.
6. On a motion made by the Corporation of the city of New York, or on one made under the act of 1859 by the comptroller, to set aside a judgment against the Corporation, on the ground of collusion, fraud, and irregularity, the court should not inquire into the merits of the action, nor be influenced by considering whether opening the judgment would result in gain or in loss to the defendants. Such motions are founded on a mere matter of right, resting on the existence of the collusion, fraud, or irregularity. *People and Taylor a. Mayor, &c.*, of New York, *Ante*, 66.

ATTACHMENT, 1; ANSWER, 10, 12, 13; APPEAL, 9; ARREST, 7-9; JUDGMENT, 5.

MUNICIPAL CORPORATION.

1. Of the construction and necessary limitations of a provision in a charter, requiring all work done and supplies furnished to the Corporation to be by contract. *Farmers' Loan and Trust Co. a. Mayor, &c.*, of N. Y., 4 *Bosw.*, 80.
2. An ordinance of a Municipal Corporation, passed by one board at one session, but not passed by the other until the next session, is not duly passed, and is void. *Beekman's Case, Ante*, 164.
3. A subsequent amendment, duly passed, does not operate to give validity to the ordinance. *Ib.*
4. Such objection to an ordinance authorizing an assessment, is a "legal irregularity" within the act of 1858, allowing assessments in the city of New York to be set aside. *Ib.*
5. That act is not unconstitutional as conferring any new office or trust on the justices of the Supreme Court. *Ib.*

NEW TRIAL.

1. The Code does not permit a party who has recovered a verdict, to move for a new trial on the judge's minutes, on the ground that the damages awarded him are too small. It authorizes this mode of reviewing the proceeding at a trial only in three cases: upon exceptions, for insufficient evidence, and for excessive damages. By insufficient evidence is intended a case where the verdict is contrary to the evidence, not where the jury have found a verdict on evidence. A verdict for excessive damages is in one sense a verdict upon insufficient evidence, but its enumeration in the statute shows that it was not supposed to

NEW YORK CITY.

fall, necessarily or properly, within that class of cases. A verdict upon insufficient evidence, means a verdict for a party upon evidence insufficient to establish his right to recover, and which therefore ought not to stand. A party cannot move to set aside a verdict in his own favor, on the ground that the evidence was insufficient to sustain it. *Supreme Ct.*, 1860, *Moore v. Wood*, 19 *How. Pr.*, 405.

2. Where, on the trial of a cause, the jury are instructed, in respect to the rule of law which they are to apply, as requested by the defendants, and a verdict passes against them, and they move for a new trial on the ground that the verdict is contrary to evidence; the defendants have a right, for all the purposes of such motion, to insist that such instruction is correct. If, on a fair application of the charge, the verdict is contrary to evidence, it will be set aside and a new trial be granted. In such a case, it is erroneous to refuse a new trial on the ground that the plaintiff has some equity, disclosed by the evidence, which entitles him to retain the verdict; especially when the pleading neither intimates its nature or existence, nor an intention to assert and enforce it. *N. Y. Superior Ct.*, 1859, *Bunten v. Orient Mut. Ins. Co.*, 4 *Bosw.*, 254.
3. After trial by a judge without a jury, the court, on a motion for a new trial on the ground of newly-discovered evidence, will assume that the judge found the facts correctly, and that his conclusions of law are free from error. *N. Y. Superior Ct.*, 1859, *Burnett v. Phalon*, 4 *Bosw.*, 622.
4. New trial granted on the ground of discovery of error in account-books produced on the trial. *Butterworth v. Warth*, 4 *Bosw.*, 623.
5. Newly-discovered evidence that is merely cumulative, is not ground for a new trial. *N. Y. Superior Ct.*, 1859, *Burnett v. Phalon*, 4 *Bosw.*, 622.
6. If an indictment has been once tried in the Court of Sessions, the second trial should be had in the same court, unless some reason is shown to the Oyer and Terminer for allowing the trial to be had in the latter court. *People v. Shepard*, *Ante*, 59.

MOTIONS AND ORDERS.

NEW YORK CITY.

1. Under the charter of the city of New York, as amended in 1857 (1 *Laws of 1857*, 874), in the absence of the mayor from the city, the president of the Board of Aldermen becomes mayor in fact for every purpose, and can exercise all his powers, including the appointment and removal of officers. *Devlin v. Platt*, *Ante*, 398.

NEW YORK COMMON PLEAS.

2. The mayor has no power to *suspend* the chamberlain. The latter officer is only the chief of a bureau, and it is only heads of departments that the mayor may suspend. *Ib.*
3. The counsel of the Corporation of the city of New York has no larger powers, as such, to bind his clients, than those connected with the ordinary relations of attorney and client. *People and Taylor v. Mayor, &c., of New York, Ante, 66.*
4. The want of the written consent of two-thirds of the owners of property to change the grade of the streets, is not a sufficient cause within the provisions of the act in relation to frauds in assessments for local improvements in New York (*Laws of 1858, 574*), to vacate the assessment for paving the streets after such grade was adopted.
The words of the statute, "that if in the proceeding relative to any assessment or assessments for local improvements in the city of New York, . . . any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved may apply," &c., cannot by any fair interpretation be extended beyond the initiatory proceedings to order the doing of the work for which the assessment is to be made. The changing of the grade in streets is not necessarily a proceeding relative to the subsequent assessment for repaving, rendered necessary by by such change of grade. *Supreme Ct., Sp. T., 1859, Matter of Buhler, 19 How. Pr., 317.*
5. *It seems*, that if the Common Council should pass a law or order an improvement for which they had no authority, and the whole proceeding was absolutely void and without jurisdiction, all subsequent legislation founded on such void act, must also be irregular and void, and in such a case this act might be resorted to for relief against any assessment so imposed. *Ib.*
6. The act of April 17, 1860, imposes on the Supervisors of the county of New York the duty of collecting the expenses of the Commissioners of Records. *People on rel. Commissioners of Records v. Supervisors of New York, Ante, 114.*

MUNICIPAL CORPORATION.

NEW YORK COMMON PLEAS.

1. Under the present enlarged jurisdiction of the New York Common Pleas and its judges, the provision of *Laws of 1844, 30, ch. 32*,—declaring that no habeas corpus or certiorari shall be allowed, removing a proceeding before judgment or final decision, from the Court of Common Pleas,—applies not only to proceedings in the court, but also to
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- all such proceedings as by statute are authorized to be instituted before any judge of the court. *Devlin v. Platt*, *Ante*, 398.
2. A certiorari addressed to a judge of the Common Pleas to remove proceedings to compel the delivery of books and papers belonging to a public office, before such proceedings have been brought to a determination, may be disregarded as a nullity by the judge to whom it is addressed. *Ib.*
 3. Under the various provisions of law relating to the New York Common Pleas, an associate judge of that court possesses the power conferred by the Revised Statutes upon the first judge of the county in respect to those proceedings. *Ib.*
 4. What costs may be allowed by the Common Pleas on appeal from the Marine Court. *Lewis v. Fox*, *Ante*, 281.

NEW YORK MARINE COURT, 2, 3.

NEW YORK DISTRICT COURTS.

An action may be brought before any justice where the plaintiff resides out of the city of New York. *N. Y. Com. Pl.*, 1860, *Ball v. Mander*, 19 *How. Pr.*, 468.

NEW YORK MARINE COURT.

1. The act of 1859, giving the comptroller power to take all necessary means to open collusive and fraudulent judgments against the city, does not give to the Marine Court such power. *Martin v. Mayor, &c.*, of New York, *Ante*, 295.
2. Though a transcript of such judgment has been filed in the county-clerk's office, the Common Pleas have no power to open the judgment. *Ib.*
3. The provision of section 68 of the Code, as amended in 1851,—that judgments in such a court, when docketed in the county-clerk's office, shall be deemed judgments of the Common Pleas,—means that they are to be so considered simply, for the purpose of enforcement. *Ib.*
4. The New York Marine Court cannot open judgments rendered by them, unless the same were obtained by default. *Ib.*
5. What costs may be allowed by the New York Marine Court on appeals. *Lewis v. Fox*, *Ante*, 281.

NOTICE.

APPEAL, 6; ATTACHMENT, 6; EXAMINATION OF PARTIES, 1; EXECUTION, 2; FORECLOSURE, 1, 2.

OFFICER.

OFFICER.

1. Where power or jurisdiction are delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for any thing done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public or any person denying its validity, are power in the officer and fraud in the party. [6 Pet., 691.] *N. Y. Superior Ct.*, 1859, *State of Michigan v. Phoenix Bank*, 4 *Bosw.*, 363.
2. The power to remove an officer for cause is of a discretionary or judicial nature, and, unless otherwise specially provided by law, is not the subject of examination or review by any other tribunal than the one in which the power is vested, either in respect to the cause, or in respect to its sufficiency, or existence, or in any respect whatever. *People and Platt v. Stout*, *Ante*, 17.
3. The proceedings given by 1 Rev. Stat., 358, § 9; 125, § 55, to compel delivery of official books and papers, do not apply to a case where there is a real question of title to the office, and no possession to any practical purpose has been obtained by the party seeking to institute the proceedings. [6 Hill, 616; 14 Barb., 396; 24 Ib., 587.] Wherever a person is in the office exercising its functions, he should be entitled to take this proceeding to obtain the books and papers; and, on the other hand, though having the best possible right to an office, one should not have possession of the books and papers by this proceeding, while it is apparent he is not in the occupancy of the office, and not in a condition to exercise the functions of it. A party in possession of an office, with claim or color of title, should have the custody of the books and papers; and a party out of possession and not in a condition to exercise its functions, and who makes no attempt to perform its duties, should not have these incidents and appurtenances to the office until there has been a trial of the title in the mode provided by law, and his right has been there established. The statute is only applicable where the title is clear, and where the party against whom the proceeding is taken is not in possession under color of a legal right to hold the office. *Supreme Ct., Chambers*, 1860, *Matter of Davis*, 19 *How. Pr.*, 323.

PARTIES.

PARTIES.

1. An action to recover the possession of lands must be brought against the tenant in possession, since, as well as before, the Revised Statutes. *People v. Ambrecht, Ante*, 97.
2. An action by a married woman for fraudulent representations, whereby she was induced to sell lands which were her separate property, and with this separate property to purchase certain worthless stock, is properly brought by her alone under section 114 of the Code. *Supreme Ct.*, 1860, *Newbery v. Garland*, 31 *Barb.*, 121.
3. In an action by a creditor of a corporation for the recovery from a stockholder of a debt of the corporation, omission to make the corporation a party is not ground for demurrer. It is only where the parties are united in interest that they must be brought in by the plaintiff. In other cases, if necessary, the court may order such to be made parties. *Supreme Ct., Sp. T.*, 1859, *Perkins v. Church*, 31 *Barb.*, 84.
4. Where, in an action for fraud and deceit for the sale of stock, it appeared that defendant sold the stock through H., as his agent, and that the stock purchased by plaintiff through H. was in fact purchased by defendant, and that the land conveyed by plaintiff in payment was received by H. for defendant, and subsequently and before the suit, conveyed to the latter,—*Held*, that H. was not a necessary party. *Supreme Ct.*, 1860, *Newbery v. Garland*, 31 *Barb.*, 121.
5. In order to call upon the court to set aside certain provisions of an assignment, and to carry it into effect as thus modified, the action must be brought for the benefit of all creditors who may come in and contribute to its expenses. *Supreme Ct., Sp. T.*, 1860, *Cox v. Platt*, 19 *How. Pr.*, 121.
6. The devisees in remainder of premises out of which rent issues, may maintain a joint action against the executor of the life tenant for rent collected by him, which became due after the termination of the life estate. *Ct. of Appeals*, 1860, *Marshall v. Moseley*, 21 *N. Y. (7 Smith)*, 280.
7. Where an owner of land dies leaving a widow and infant heirs, any action for use and occupation, or injury to the possession must be brought by the widow as guardian in soccage. *Supreme Ct.*, 1857, *Sylvester v. Ralson*, 31 *Barb.*, 286.
8. In, and previous to, May, 1849, there existed in New York three unincorporated associations of similar objects, viz.:—The American Protestant Society, whose object was to diffuse through the United States the principles of the Protestant Religion;—The Foreign Evangelical

PARTIES.

Society, whose object was to promote the moral and religious welfare of the inhabitants of foreign Christian countries ;—and The Christian Alliance, whose object was to unite Christians of all denominations in promoting religious freedom and knowledge in Papal countries. These associations were simultaneously dissolved, and the members of them associated themselves as The American and Foreign Christian Union, whose object was declared to be to diffuse religious liberty and pure Christianity both at home and abroad, where a corrupt Christianity exists. The defendants' testator, who died shortly before the union of these societies, bequeathed a legacy to be paid in six years from his decease, to the person who at such time should act as treasurer of the American Protestant Society, the first above named.

Held, 1. That the new society sufficiently represented the other to be entitled to the legacy.

2. That an action to recover it must be brought in the name of the treasurer of the new society, he being the real party in interest. *De Witt v. Chandler*, *Ante*, 459.

9. The president of such an association may, under the acts of 1849 and 1851, maintain actions on behalf of the association ; and if the legacy had been to the association instead of the treasurer, the president might recover thereon. *Ib.*
10. The objection that such an action was brought in the name of the president instead of the treasurer, need not be taken by demurrer or answer, but may be taken on the trial on the ground that the facts do not constitute a cause of action. *Ib.*
11. Although the complaint in such an action, among other relief, demands the appointment of a trustee to receive the legacy, if such appointment should be adjudged necessary, the court will not deem that a proper subject to be passed on in a suit framed for the main purpose of obtaining payment of the legacy to the existing treasurer. *Ib.*
12. In such case the order dismissing the complaint should be without prejudice to a new action. *Ib.*
13. The court will not order new parties-defendant to be brought in against the will of the plaintiff, unless their presence is necessary to the determination of the action. *Sawyer v. Chambers*, *Ante*, 110.
14. A judgment declaring the rights of parties in a fund in court, reversed because persons who made claims upon it were not made parties. *Valentine v. Wetherill*, 31 *Barb.*, 655.

CREDITOR'S ACTION, 7 ; DEMURRER, 2 ; INJUNCTION, 4 ; JUDGMENT,
1, 2, 3.

 PARTITION.

PARTITION.

1. Even if the provisions of 2 Revised Statutes, 317,—relating to proceedings for partition at law, upon petition,—can be deemed applicable to actions under the Code, those provisions only require notice of appointment of guardians to be served on resident minors, not on non-residents. *Rogers v. McLean, Ante*, 440.
2. One of several heirs who maintains proceedings for the protection of the estate, on the promises of the others to share the expense, does not acquire thereby a lien for disbursements so incurred, against their interests in the estate, which can be recognized in his action for partition. *Bulen v. Burdell, Ante*, 381.

SERVICE, 2.

PARTNERSHIP.

What facts will raise a presumption that a partner was cognizant of and assenting to fraud committed by his copartners. *Townsend v. Bogart, Ante*, 355.

PLEADING.

1. Before the court can take notice of the regulations of particular religious denominations, or their nature or effect, their existence should be properly averred and proved as matter of fact. *Supreme Ct.*, 1859, *Youngs v. Ransom*, 31 *Barb.*, 49.
2. Fraud committed through an agent is well stated in pleading as that of the principal. If this were otherwise, and it appeared at the trial to be that of an agent without any participation of his principal, the variance is the subject of amendment, and will be disregarded upon appeal. *Ct. of Appeals*, 1860, *Bennett v. Judson*, 21 *N. Y. (7 Smith)*, 238.
3. In pleading a statute which is of such a nature that a three-fifths vote is required to pass it, it is not necessary to allege that such a vote was had. An averment that the statute was passed is sufficient on demurrer. *Wolfe v. Supervisors of Richmond, Ante*, 270.
4. Irrelevancy in pleading as used in the Code, like impertinence as used in Chancery practice, comprehends both prolixity or needless details of material matter, and matter out of which no cause of action or defence could arise between the parties in the particular suit. *Lee Bank v. Kitching, Ante*, 435.
5. A complaint in an action against a sheriff, for the escape from his

PRINCIPAL AND SURETY.

custody of a person arrested by him upon a process for contempt, which alleges that the sheriff "suffered and permitted such person to escape and go at large," states a voluntary, and not a negligent escape; and an answer which avers that such person "may have wrongfully and privily, and without the knowledge, permission, or consent of this defendant, escaped," &c., and that "if he did so escape, he afterwards" returned into custody, &c., is insufficient as a pleading, as it does not deny, either generally or specifically, the allegation that the sheriff permitted the prisoner to escape. *N. Y. Superior Ct.*, 1859, *Loosey v. Orser*, 4 *Bosw.*, 391.

6. The plea of *non est factum* did not admit the plaintiff's damages. *Supreme Ct.*, 1857, *Bennett v. Brown*, 31 *Barb.*, 158.

AMENDMENT; ANSWER; BILL OF PARTICULARS; COMPLAINT; DEMUR-
 RER; JUSTICES' COURTS, 1; PARTIES, 9, 10.

PRINCIPAL AND SURETY.

1. There is a very material distinction between the omission to prosecute the principal debtor altogether, and the omission to prosecute within a reasonable time, and with due diligence. A reasonable time is not a definite time, and must always depend upon the particular circumstances of the case. *It seems*, that a delay that is not prejudicial is not unreasonable. *Supreme Ct.*, 1860, *Gallagher v. White*, 31 *Barb.*, 92.
2. The surety is released, if the principals vary the contract without the surety's consent. *Henderson v. Marvin*, *Ante*, 142.
3. The shortening, by the principals, of the stipulated time of credit, discharges the surety,—*So held*, where the creditor sued before the expiration of the time originally stipulated. *Ib.*

PROCESS.

1. A subpoena to testify as a witness, is a "process" within the meaning of 2 Rev. Stat., 287, § 10,—prohibiting any person not the general law-partner of an attorney, or a clerk in his office, from suing out any process, &c., in the name of such attorney. The statute was obviously intended to include every process which, by being served upon the party named in it, would give the court or officer before whom any proceeding was had, jurisdiction over such person. *Supreme Ct.*, 1860, *Yorks v. Peck*, 31 *Barb.*, 350.
2. The fact that the attorney whose name was used, was ignorant of the use of it, does not affect the liability of the party using it. *Ib.*

 PROTEST.

PROTEST.

1. Mode of serving notice of protest in cities. *Davenport v. Gilbert*, 4 *Bosw.*, 532.
2. Notice to an indorser of a note, of non-payment thereof, is not sufficient to charge him. He must have notice of presentment or demand and non-payment. *Paquique Bank v. Martin*, *Ante*, 291.

QUESTIONS OF LAW AND FACT.

1. Negligence is in all instances a question of fact, and it is only where a question of fact is entirely free from doubt that the court has a right to apply the law without the action of the jury. *Supreme Ct.*, 1860, *Bernhardt v. Rensselaer & Saratoga Railroad Co.*, 19 *How. Pr.*, 199.
2. Whether a judgment of nonsuit in a proceeding by way of intervention to claim goods which are attached by the defendant as the property of a third person is, by the laws of a foreign State, a bar to an action by the intercessor for damages for taking the goods, is a question of fact to be proved, and the court will not, on application for leave to put in a supplemental answer to set up such a judgment rendered after the former answer, undertake to determine that question upon conflicting affidavits. *N. Y. Superior Ct., Sp. T.*, 1859, *Bate v. Fellowes* 4 *Bosw.*, 638.

CORPORATION, 4.

RAILROAD COMPANIES.

- A railroad company, formed under the general railroad law of this State, have not a right to abandon any portion of their road whenever they choose. *People v. Albany & Vermont Railroad Co.*, *Ante*, 136.

RECEIVER. .

1. To warrant the appointment of a receiver before judgment under the Code, both a *prima-facie* right to the property which is the subject of the action, and which is in the possession of the adverse party; and, also, as matter of fact, that "the property, or its rents and profits, are in danger of being lost or materially injured or impaired, must be shown." *Supreme Ct., Sp. T.*, 1859, *People v. Mayor, &c., of New York*, 19 *How. Pr.*, 289.
2. An order appointing a receiver of a railroad corporation under foreclosure of a mortgage, which authorized him "to pay the amounts due

REFERENCE.

and maturing for materials and supplies about the operation and for the use of said road,"—construed to confine such payments to persons who had furnished materials within a short time previous, for repairing or operating the road, and not as extending to any claims for materials furnished at any time previous, either for construction or any other purpose, especially after such claims had matured, had changed into promissory notes, and the notes had been sold in the market, and from time to time renewed. *Supreme Ct., Sp. T.*, 1860, *Brown v. New York & Erie Railroad Co.*, 19 *How. Pr.*, 84.

CONTEMPT 1; CORPORATION, 5, 6 • FORECLOSURE, 3.

REFERENCE.

1. Even in a case proper for a reference, the consent of the parties to refer a cause, and a memorandum of the judge upon his calendar that the cause had been referred, naming the referee, does not constitute the referee an officer or tribunal with the power of administering a legal oath. There must be an order of the court appointing him a referee; and an order entered after the proceedings before him are over, does not give effect to an oath administered by him in those proceedings. *Supreme Ct.*, 1860, *Bonner v. McPhail*, 31 *Barb.*, 106.
2. When an action is terminated either by a judgment of the court, in favor of the defendants, or by voluntary discontinuance of the plaintiff, a reference to ascertain the damages which the defendants have sustained by reason of an injunction issued therein, is proper. [1 *Duer*, 664.] But an order made before that may be sustained, if made in order to inform the court as to the terms upon which it would be proper to allow the plaintiff to discontinue. *Supreme Ct., Sp. T.*, 1860, *Taaks v. Schmidt*, 19 *How. Pr.*, 413.

APPEAL, 14.

RELIGIOUS CORPORATION.

1. The rights of owners of burial vaults in churchyards, in cities, in respect to resisting a sale of the premises by the church. *Richards v. Northwest Dutch Church*, *Ante*, 30.
2. Of elections in religious corporations. *People on rel. Hartt v. White*, *Ante* 168.

REMOVAL OF CAUSES.

A motion to discharge an order of arrest,—*Held*, an entry of appearance which would preclude defendant from removing the cause to a Federal court. *Dart v. Arnis*, 19 *How. Pr.*, 429.

REPLY.

REPLY.

1. A counter-claim is in the nature of a complaint in a cross-action. In an action for taking or converting personal property, it is not necessary for a defendant to deny the amount of value or the allegation of damage. They must be proved on an assessment, although the defendant puts in no answer. [2 E. D. Smith, 314.] Hence, if such a demand is set up as a counter-claim, omission to reply does not admit the value of the property or the damages. *N. Y. Superior Ct.*, 1859, *McKensie v. Farrell*, 4 *Bosw.*, 192.
2. That a mere denial that defendant is entitled to any sum, admits the facts which he sets up as a counter-claim. *Ib.*

RES ADJUDICATA.

1. How far the right of a custodian, to whom children are committed by their father by deed or will, is bound by a determination of a surrogate appointing a guardian for them. *People v. Kearney*, 31 *Barb.*, 430; *S. C.*, 19 *How. Pr.*, 493.
2. The decision of a referee on a question within the power of the court to direct to be determined by a reference, and which might be reviewed by appeal,—*e. g.*, on a question of the settlement of the accounts of a receiver,—is a determination, which, when made an order of the court, is conclusive on the parties as *res adjudicata*. *Demarest v. Daig*, *Ante*, 9.

SECURITY FOR COSTS.

In an action brought by a non-resident assignee in trust for the benefit of creditors, the court may, in its discretion, require security for costs, and this after the plaintiff has taken an appeal from a judgment entered against him in the action. *N. Y. Superior Ct., Sp. T.*, 1860, *Ranney v. Stringer*, 4 *Bosw.*, 663.

SERVICE (AND PROOF OF).

1. The mere fact that process was served on Saturday on a person who keeps that day as holy, does not render the judgment thereon void. *Marks v. Wilson*, *Ante*, 87.
2. After commencement of an action for partition, by service of summons on some of the defendants, the general guardian or committee of an infant lunatic who is named as a party and is interested in the subject-

SET-OFF.

matter, may apply to the court for the appointment of a guardian *ad litem* for such infant lunatic, under the provisions of the Code. Personal service on such infant lunatic is not necessary. *Rogers v. McLean, Ante, 440.*

3. If the petition of the committee in such case does not show that the infant lunatic resided with the petitioner, or was under his charge or custody, such omission, if it be a defect, may be cured by amendment after judgment. *Ib.*
4. An affidavit of the non-residence of certain defendants, on information and belief,—*Held*, sufficient to sustain an order for service by publication founded on it. *Van Wyck v. Hardy, Ante, 473.*
5. An affidavit made to obtain an order for service of summons by publication, is insufficient to sustain an order which directs publication merely, without directing service by mail, unless such affidavit shows the fact of plaintiff's inability to discover the place of residence of the defendant sought to be served. *Cook v. Farmer, Ante, 40.*
6. An order made on such a defective affidavit is without jurisdiction. *Ib.*
7. An order for service by publication granted on the 18th, directed the summons to be mailed forthwith.

Held, that a delay in mailing till the 22d, caused by waiting to have the papers printed, did not render the service irregular. *Van Wyck v. Hardy, Ante, 473.*

SET-OFF.

1. A stockholder in a building company formed under chapter 122 of the Laws of 1851, who has made advances or incurred liabilities for the benefit of the corporation, may, when called upon to respond to his statutory liability, set off such advances or liabilities in extinguishment thereof. *Remington v. King, Ante, 278.*
2. A member of a mutual marine insurance company cannot, upon its insolvency, set off against his indebtedness for premiums due upon policies, a loss sustained by him, adjusted and payable by the company. *Ct. of Appeals, 1860, Lawrence v. Nelson, 21 N. Y. (7 Smith), 158.* See also *Lawrence v. Nelson, 4 Bosw., 241.*

SHERIFF.

1. Where a sheriff has levied an execution upon property, and it is taken from his possession under an action in the nature of replevin, in which he afterwards obtains judgment, it is his duty to prosecute the sureties

SHERIFF.

- in the undertaking of the plaintiff in the latter action, without requiring from the plaintiff in the execution in the former action, any indemnity as a condition of his prosecuting the undertaking. The undertaking which he receives where property is thus taken from his custody, becomes the equivalent of the property, and though in form it may run to the coroner, the sheriff must enforce it. *Ct. of Appeals*, 1860, *Swezey a. Lott*, 21 *N. Y. (7 Smith)*, 481.
2. Of the liability of the sheriff for the safe-keeping of the property in his custody. *Moore a. Westervelt*, 21 *N. Y. (7 Smith)*, 103.
 3. It is a breach of public duty for the sheriff or a referee, in any case to suffer the attorney for the plaintiff to take into his own hands the proceeds of a sale, and deal with and dispose of them at his pleasure, and at the time most suitable to his convenience. *Supreme Ct.*, 1860, *Van Tassel a. Van Tassel*, 31 *Barb.*, 439.
 4. Under the Code, the liability of a sheriff who arrests a defendant, and takes bail who fail to justify, is the same that the liability of the bail would have been; and this rule applies to the case of an arrest under subdivision 3, of section 179, in an action for the recovery of personal property, where the undertaking of the bail is to pay such judgment as shall, for any cause, be recovered against the defendant. *N. Y. Superior Ct.*, 1859, *Gallarati a. Orser*, 4 *Bosw.*, 94.
 5. In such case the issue and return of an execution against defendant's person is not necessary to charge the sheriff. *Ib.*
 6. The provision of 2 Revised Statutes, 437, § 63,—giving an action of debt against the sheriff for an escape from final process,—is still in substance in force; and the sheriff may be held liable in a similar action under the Code, for the judgment for which the prisoner was committed. *Barnes a. Willett*, *Ante*, 225; *N. Y. Superior Ct.*, 1859, *Renwick a. Orser*, 4 *Bosw.*, 384; *Sp. T.*, 1860, *McCreery a. Willett*, *Ib.*, 643; and see *Loosey a. Orser*, *Ib.*, 391.
 7. A sheriff who does not return an execution is, *prima facie*, liable for the debt, but may mitigate the damages by showing that the defendant had no property on which the judgment could be levied. Where there was sufficient property, and he has not made the money nor returned the execution, nor shown any sufficient reason why he has not done so, he is chargeable with the debt. [1 *Hill*, 275; 6 *Ib.*, 550; 4 *Sandf.*, 67; *S. C.*, 3 *Seld.*, 550.] *Ct. of Appeals*, 1860, *Swezey a. Lott*, 21 *N. Y. (7 Smith)*, 481.
 8. In an action founded on the statute, as distinguished from a mere action for damages, the sheriff cannot interpose as a defence the insolvency or poverty of the prisoner. *Barnes a. Willett*, *Ante*, 225; *N. Y. Superior Ct.*, *Sp. T.*, 1860, *McCreery a. Willett*, 4 *Bosw.*, 643.

SLANDER.

9. In an action against the sheriff for the escape of a person arrested by him upon an execution against the body of such person, it is no defence that such execution was issued before one against the property of such person had been issued, and returned unsatisfied. The issuing of a *ca. sa.* before the return of a *fi. fa.* unsatisfied, is an irregularity, merely, and does not make the *ca. sa.* void. [13 Johns., 529, 378; 8 Cow., 192; 8 Wend., 545; 2 Hill, 378, 354; Grah. Pr., 364; 6 How. Pr., 73.] *N. Y. Superior Ct.*, 1859, *Renwick v. Orser*, 4 *Bosw.*, 384.

ANSWER, 3; COUNTY, 1; DEED, 1; LIMITATIONS, 1.

SLANDER.

In an action of slander, where the words, charging plaintiff with giving false testimony, are not actionable in themselves, it is incumbent on the plaintiff to show that they were spoken in reference to a judicial proceeding before a court or officer of competent jurisdiction. *Supreme Ct.*, 1860, *Bonnar v. McPhail*, 31 *Barb.*, 106.

SPECIAL PROCEEDING.

An application for admission to practise as an attorney, is a remedy of the class of special proceedings; and an appeal lies to the Court of Appeals from an order of the court denying such application. *Matter of the Graduates*, *Ante*, 301.

SPECIFIC PERFORMANCE.

1. A provision in articles of copartnership for, a sale of trade-mark at auction on dissolution, and that the parties might bid for it among themselves,—*Held*, enforceable specifically. *Supreme Ct.*, *Sp. T.*, 1860, *Comstock v. White*, 31 *Barb.*, 301.
2. Either party allowed to amend by inserting a demand for such relief. *Ib.*

STATUTES.

1. A contract prohibited by statute, and entered into while the prohibiting statute is in force, is not rendered valid by a subsequent repeal of the statute. *Washburn v. Franklin*, *Ante*, 93; but compare to the contrary, *Central Bank v. Empire Stone-Dressing Co.*, 26 *Barb.*, 23.
2. Although a statute under which public expenses are incurred, may be

STAY OF PROCEEDINGS.

unconstitutional, a tax may properly be levied to meet the expenses. *People on rel. Commissioners of Records a. Supervisors of New York, Ante*, 114.

3. The power of the governor to approve and sign a bill presented to him within ten days previous to the adjournment of the Legislature, does not cease with the adjournment. *Ct. of Appeals*, 1860, *The People a. Bowen*, 21 *N. Y. (7 Smith)*, 517.

STAY OF PROCEEDINGS.

ATTACHMENT, 7.

SUMMARY PROCEEDINGS.

1. Under 2 Revised Statutes, 513, § 28,—providing that any tenant-at-will or at sufferance, or for any part of a year, or for one or more years, of houses or lands, may be removed summarily, where he shall hold over and continue in possession of the same after the expiration of his term, without the permission of the landlord ;—and under 1 Revised Statutes, 745, § 7,—requiring no notice to remove, except where the holding is at will or by sufferance, and then requiring one month's notice in writing,—a tenant from year to year is clearly a tenant for one or more years ; hence, as no notice to quit is required by the Revised Statutes to be given to a tenant for one or more years, to authorize summary proceedings for his removal, none need be given to a tenant from year to year, but he may be proceeded against in a summary manner, for holding over after the expiration of his term, without six or one month's previous notice. [8 *Cow.*, 13 ; 4 *Kent's Com.*, 9 ed., 129, 130 ; 14 *Barb.*, 255.] *Supreme Ct., Sp. T.*, 1860, *Park a. Castle*, 19 *How. Pr.*, 29.
2. The term of a tenant from year to year, should be regarded as ended, within the meaning of the Revised Statutes authorizing the summary removal of tenants, at the expiration of each year he holds over the original term. When a tenant for a year, or for one or more years, holds over after the expiration of his term, without any express agreement, but with the assent of his landlord, the law implies that he holds the premises upon the former terms for another year. [1 *Den.*, 113 ; 13 *Wend.*, 479 ; 8 *Cow.*, 226 ; 8 *Hill*, 547.] Hence he may be turned out of possession summarily, without any previous notice, at the end of any year he so holds over, because his term, that the law fixes for him, then expires, and he knows, without notice, that he cannot continue in possession longer, unless he has permission from his landlord. *Ib.*

INJUNCTION.

SUMMONS.

SUMMONS.

1. An action brought, not to recover a specific sum of money due or payable upon an express or implied contract, but to recover damages for the non-performance of the covenants contained in a lease to work and till a farm in a good and workmanlike manner, is not an action brought "for the recovery of money," within the true intent and meaning of that phrase in subdivision 1 of section 129, and in section 246, of the Code. [1 Code R., 126; 14 How. Pr., 454, 395.] *Supreme Ct.*, 1859, *Cobb v. Dunkin*, 19 *How. Pr.*, 164.

2. Where, in service by publication, the summons, as published, was dated New York, and stated that the complaint was filed in the clerk's office in that city;—

Held, that designating the place of the office of the attorney by street and number, without adding the name of the city, did not render it void. *Van Wyck v. Hardy*, *Ante*, 473.

AMENDMENT, 1.

SUNDAY.

1. That judicial proceedings on Sunday are void at common law. *Merritt v. Earle*, 31 *Barb.*, 38.
2. When, from accident or mutual error, the day of fulfilling an agreement falls on Sunday, the party may defer its performance to the ensuing Monday without impairing a right or incurring a forfeiture. *N. Y. Superior Ct.*, 1859, *Campbell v. International Life Assurance Society*, 4 *Bosw.*, 298.

SERVICE.

SUPPLEMENTAL PLEADING.

ANSWER, 15; COMPLAINT, 19; COSTS, 11.

SUPPLEMENTARY PROCEEDINGS.

1. Examinations on supplementary proceedings to a judgment can only be extended to the discovery of the property in the possession or control of the defendant, which he can deliver over. If the property is in the possession of another claiming title, no matter how fraudulent the transfer, no order can be made to compel him to deliver it, and there-

SUPREME COURT.

fore no questions can be put to the debtor or a witness to discover or prove the fraud. *N. Y. Superior Ct., Sp. T.*, 1860, *Town v. Safe-guard Insurance Company*, 4 *Bosw.*, 683.

2. Several creditors' actions were brought against defendants and their assignee, and the assignment was set aside and a receiver appointed, who duly qualified. After the commencement of these actions, and after receiver appointed and judgment recovered in one of them, but before judgment in the others, C. commenced supplementary proceedings against the same defendant, and had the same receiver appointed, and by consent of parties he gave no new bond, they agreeing to consider his bond in the creditors' action as sufficient. Subsequently to the commencement of these supplementary proceedings, other creditors commenced creditors' actions, in which they had similar judgments, which were recovered after the order appointing the receiver in the supplementary proceedings.

Held, That C. had not obtained any lien on the funds in the hands of the receiver appointed in the actions brought to set aside the assignment. As against all the world except creditors, proceeding directly to attack such assignment, the assignee is the owner of such assets, and the receiver is bound to pay them to him, unless a creditor intervene and commence a suit to vacate the assignment as against him. C. only obtained such a lien as proceedings in a supplementary examination of a judgment-debtor could give him, which is no more than such debtor could voluntarily give him, and he (the debtor) could not deprive the assignee of his rights. *N. Y. Superior Ct., Sp. T.*, 1860, *Conger v. Sands*, 19 *How. Pr.*, 8.

3. *It seems*, too, that the receiver must give bond before any lien can be acquired. *Id.*

APPEAL, 7.

SUPREME COURT.

1. The court should not disregard a decision of the Court of Appeals on the ground that that court overlooked an important consideration, but should leave it to that court to correct the error. *Supreme Ct.*, 1857, *Burton v. Baker*, 31 *Barb.*, 241.
2. The Supreme Court have not power by certiorari to arrest a special proceeding,—*e. g.*, proceedings to compel delivery of official books and papers, under 1 Rev. Stat., 124, §§ 50–53,—instituted before a judge of another court sitting at chambers, prior to any final determination being made of the matter involved. *Devlin v. Platt*, *Ante*, 398.
3. The power of the Supreme Court over the admission of attorneys is

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not beyond the control of the Legislature. Matter of the Graduates, *Ante*, 301.

4. The act of April, 1852,—*Laws of 1852*, 592, § 7,—is unconstitutional so far as it assumes to authorize the Board of Supervisors to raise by tax, and pay, an additional compensation to the justices of the first judicial district in office at the time of its passage. People *on rel. Mitchell v. Haws*, *Ante*, 261.

JURISDICTION.

SURROGATES' COURTS.

1. Surrogates' Courts are courts of peculiar and special jurisdiction. [10 Barb., 308; 6 Ib., 352; 26 Ib., 316.] They can only exercise the jurisdiction and powers conferred upon them by statute [1 Kern., 324; 3 Rev. Stat., 5 ed., 362, § 1]; and if the statutes regulating their jurisdiction and prescribing their powers, when favorably construed, fail to confer the authority claimed, it does not exist. [14 Wend., 48; 1 Kern., 328.] *Supreme Ct.*, 1860, *Cleveland v. Whiton*, 31 Barb., 544.
2. Where upon an application to a surrogate for probate of a will and for letters-testamentary thereon, the residence of the testator at the time of his death, in the county of such surrogate, is plainly averred in the petition, and is not in any way controverted, but is substantially admitted by all the parties interested in the will, and is practically established upon sufficient evidence, as a fact, by that tribunal, that court has jurisdiction of the case; its determination is conclusive as to the validity and probate of the will, and cannot be examined or assailed in any collateral proceeding, or in any other tribunal of original jurisdiction. *Supreme Ct.*, 1859, *Burnstead v. Read*, 31 Barb., 661.
3. General principles of jurisdiction stated. *Ib.*
4. A party to the record, in proceedings before a surrogate, upon the final accounting of an administrator, is not a competent witness.* Neither the act of December 14, 1847,—authorizing parties in civil suits to obtain the testimony of the adverse party,—nor section 399 of the Code,—authorizing parties to be examined on their own behalf,—have any reference to proceedings before a surrogate. [26 Barb., 317.] *Supreme Ct.*, 1860, *Terry v. Dayton*, 31 Barb., 519.
5. The provisions of the statute in relation to sales of lands of a decedent for payment of his debts (2 Rev. Stat., 101), do not authorize the surrogate to adjust equitable rights claimed to exist between the devisees

* Otherwise by the amendment of 1860 (*Laws of 1860*, 787, ch. 459, § 12).
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of the real estate in question and the creditors of the deceased. *Supreme Ct.*, 1860, *Cleveland v. Whiton*, 31 *Barb.*, 544.

6. If the surrogate makes an equitable set-off which the statute gives him no power to compel, his decree should be reversed, though it is such as the appellate court would make on an action brought for the purpose. *Ib.*

APPEAL, 18.

TAXATION OF COSTS.

The provision of the judiciary act of 1847 (*Laws of 1847*, 645, § 38),—which declares that no county clerk shall tax costs in any case, except where the amount, exclusive of actual disbursements, is limited by law,—applies to special proceedings,—*e. g.*, proceedings in street cases,—but a judgment in such case is not necessarily erroneous because the clerk taxed the costs, though he should not have done so. The relief of the aggrieved party is by motion, and he cannot raise the objection on appeal from the judgment. *Matter of Fourth Avenue*, *Ante*, 189.

TAXES.

1. A person assessed or taxed, by reason of his personal property, may be committed as for a contempt, on account of his neglect to pay the tax. *Kahn's Case*, *Ante*, 147.
2. The New York Common Pleas have authority to commit for such neglect. *Ib.*
3. What is a sufficient commitment in such case. *Ib.*
4. Of the mode of assessing taxes on the capital of corporations. *Oswego Starch Factory v. Dolloway*, 21 *N. Y.* (7 *Smith*), 449.

TIME.

Service on the 14th of a justice's summons returnable on the 16th, is good. The law does not regard fractions of a day in computing the time for the service of process, notice, or pleadings in a cause. [10 *Wend.*, 422.] *N. Y. Com. Pl.*, 1860, *Ball v. Mander*, 19 *How. Pr.*, 468.

TRIAL.

1. Where a judge, by consent of parties, acts as trier upon the challenge of a juror to the favor, his rejection of evidence offered in support of the challenge, as immaterial, is final, as would be the decision of a trier

TRIAL.

- on such evidence, and it cannot be reviewed. *Ct. of Appeals*, 1860, *Costigan v. Cuyler*, 21 *N. Y. (7 Smith)*, 134.
2. The decision of the court in imposing terms as condition of leave to amend at the trial, like all other questions at the trial, must be deemed to be acquiesced in unless an exception is taken at the time. *Supreme Ct.*, 1860, *Griggs v. Howe*, 31 *Barb.*, 100.
 3. Where the parties seemed to consent that all objections to evidence might be reserved till the close of the trial, and accordingly a defence not set up in the answer, was proved without amending the answer,—*Held*, that it was proper for the referee, at the close of the trial, to strike out the evidence of such defence on plaintiff's objection to it; and subsequent leave of court to amend the answer did not cure the objection. *Supreme Ct.*, 1859, *Johnson v. McIntosh*, 31 *Barb.*, 267.
 4. If a guarantor intends to rely upon the want of due diligence in collecting, or in efforts to collect the money due on the note from the principal debtor, as a real and substantial defence, he should distinctly raise the question at the trial by asking for specific instructions to be given to the jury. *Supreme Ct.*, 1860, *Gallagher v. White*, 31 *Barb.*, 92.
 5. Where the issue is usury, and the lender being called as a witness, refused to answer as to the usury, on the ground that it might criminate himself; and the referee declined to compel him to, and found for the plaintiffs. *Held*, that his ruling was correct. In order to insist that the witness should be compelled to answer as to whether there was any corrupt agreement for usury (which, without reference to whether usury was actually paid, would not criminate him), counsel should have so stated at the trial. *Supreme Ct.*, 1857, *Fellows v. Wilson*, 31 *Barb.*, 162.
 6. It is for the court to decide, taking into consideration the evidence which may be material on the issue, whether a witness shall be compelled to answer questions which he declines to on the ground that he would criminate himself. *Id.*
 7. The rule that if a witness, with the fault of the party producing him, fail to answer, his testimony is to be stricken out, is applicable to the case of a party testifying in his own behalf. *Burnett v. Phalon*, *Ante*, 157.
 8. The court, in its discretion, may limit the party as to the number of witnesses to be examined as to what occurred at a given time and place between the parties, and a decision in that respect is not the subject of an exception which can be reviewed on an appeal from the judgment. The remedy is to move for a new trial. *N. Y. Superior Ct.*, 1859, *Anthony v. Smith*, 4 *Bosw.*, 503.
 9. On being charged with having committed an assault on plaintiff, de-

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- fendant denied it, but in a subsequent conversation, being charged again, was silent. *Held*, that it was proper to submit this circumstance to the jury. *Ct. of Appeals*, 1860, *Jewett v. Banning*, 21 *N. Y. (7 Smith)*, 27.
10. A judge at the circuit cannot order the *case*, but only exceptions, to be heard at the general term. *Supreme Ct.*, 1857, *Cronk v. Canfield*, 31 *Barb.*, 171.
 11. Where the guilt of a prisoner depended upon the credibility of evidence given by an accomplice,—*Held*, no error to charge the jury that they might take into consideration the omission of the prisoner to contradict the accomplice upon a statement, in respect to which, if false, contradictory evidence was apparently within the prisoner's power. *Ct. of Appeals*, 1860, *The People v. Dyle*, 21 *N. Y. (7 Smith)*, 578.
 12. Separation of the jury is not, in the absence of any appearance of prejudice to the party complaining of it, a ground for a new trial. [1 *Cow.*, 221; 3 *Ib.*, 355; 4 *Ib.*, 26, 38; 5 *Ib.*, 283; 2 *Wend.*, 52; 3 *Johns.*, 252; 7 *Ib.*, 32; 4 *Barn. and A.*, 430.] *N. Y. Superior Ct.*, 1859, *Anthony v. Smith*, 4 *Bosw.*, 503.

ANSWER, 5; JUSTICES' COURTS, 2

UNDERTAKING.

1. The court will not require a party who has given security with two sureties, as the condition of a favor shown by the court, to renew the security merely because one surety has become insolvent. *Eiseman v. Swan*, *Ante*, 112.
2. The reference ordered upon an undertaking, given on obtaining an injunction, to ascertain the damages sustained by defendants, is for the purpose of fixing the measure, not the fact, of the liability of the obligors in the undertaking; and such an order should not be reversed on appeal, unless it is perfectly clear that no action will lie on the undertaking. *N. Y. Superior Ct.*, 1860, *Carpenter v. Wright*, 4 *Bosw.*, 655.
3. *It seems*, that a dissolution of the injunction, followed by plaintiff's acquiescence by discontinuing, is a final determination, within the meaning of the undertaking. *Ib.*

BOND; REFERENCE, 2.

USE AND OCCUPATION.

The conventional relation of landlord and tenant must exist to sustain an action for use and occupation. [5 *Johns.*, 46; 1 *Den.*, 38; 25 *Barb.*,

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243; 13 Johns., 489.] *Supreme Ct.*, 1857, *Sylvester a. Ralson*, 31 *Barb.*, 286.

USURY.

ANSWER, 7, 8; TRIAL, 5.

VAGRANT.

Proof that the prisoner was a common prostitute and idle person does not authorize her commitment and conviction as a vagrant. It is only a certain class of prostitutes—viz., those without employment—who are declared by statute (1 *Rev. Stat.*, 633; *Laws of 1833*, 9, ch. 11) to be vagrants. *Forbes' Case*, *Ante*, 52.

VARIANCE.

1. In an action to recover back money paid under contract, a variance between an allegation, showing a cause of action for failure to perform a contract, and showing such conduct on defendant's part as that plaintiff was not bound to receive performance,—deemed immaterial. *Seaman a. Low*, 4 *Bosw.*, 337.
2. The answer set up one entire contract for the discount of two drafts, and the taking of the sum of \$125 as premium or interest; and the proof made out two contracts, each at a discount of one-eighth of one per cent. per day for the time which would elapse before maturity, but the time for which the discount was taken, or the sum taken, did not appear,—*Held*, that the variance between the contract set out in the answer and that proved on the trial was fatal to the defence. *Supreme Ct.*, 1860, *Griggs a. Howe*, 31 *Barb.*, 100.

AMENDMENT, 4; ANSWER, 7; APPEAL, 16, 17.

VERDICT.

1. If on the hearing of a cause, in which the verdict is taken at a litigated trial subject to the opinion of the court, upon the questions of law, the general term should permit any questions of law to be raised which were not raised on the trial; they should not permit such to be raised as, if suggested there, might readily have been obviated. *N. Y. Superior Ct.*, 1859, *McKensie a. Farrell*, 4 *Bosw.*, 192.
2. That a verdict taken subject to the opinion of the court, may be supported upon any theory consistent with the facts, though not sug-

WARRANT.

gested by the pleadings. *The Oneida Bank v. The Ontario Bank*, 21 N. Y. (7 Smith), 490.

WARRANT.

Mode of issuing warrant for school-tax. *Doolittle v. Doolittle*, 31 Barb., 312.

WILL.

1. If the provisions of a will executed by an old and feeble man, differ from his previously expressed intentions, and differ in favor of those who stood in confidential relations with him, it is evidence of fraud and undue influence, which must be overcome by the most satisfactory testimony that the testator understood its provisions, and acted freely. *Lee v. Dill*, *Ante*, 214.
2. Before a will, the execution of which was obtained from the testator by the party claiming under it, under circumstances indicating undue influence, can be admitted to probate, it must appear affirmatively that it was made by the testator when he had intelligence to comprehend its provisions, and independence to adopt or reject them. *Id.*

WITNESS.

1. In an action by husband and wife, affecting the husband's interest in lands, his wife's inchoate right of dower is not such an interest as will make the husband an incompetent witness. Under the Code, the principle of exclusion rests on public policy, and should not be extended beyond immediate and direct interests of the husband and wife. *Supreme Ct.*, 1859, *Babbott v. Thomas*, 31 Barb., 275.
2. Section 399 of the Code is sufficiently comprehensive to authorize the wife to be a witness in her own behalf, and the husband in his own behalf, whether they be co-plaintiffs or co-defendants, or whether the action be brought by one against the other. The *real parties* to actions, when husband and wife, are competent witnesses, either for the adverse parties or for themselves. *Supreme Ct.*, 1860, *Shoemaker v. McKee*, 19 How. Pr., 86; disapproving of 26 Barb., 612; 15 How. Pr., 165, 169; but see amendment of section 399, *Laws of 1860*, 787, ch. 459, § 12.
3. Upon the trial of an action, brought to recover damages sustained by the plaintiff by the use by the defendant of the plaintiff's trade-mark, the defendant cannot be compelled to answer questions tending to show that he has sold articles manufactured by himself, with a label thereon,

WRIT OF ASSISTANCE.

imitating, resembling, or purporting to be the label of the plaintiff. He cannot be compelled to give evidence tending to prove either of the three facts essential to constitute the offence prohibited by chapter 123, section 3, of Laws of 1850. *N. Y. Superior Ct., Sp. T., 1860, Byass v. Smith, 4 Bosw., 679.*

4. By not claiming such privilege in other proceedings in the cause, the defendant does not waive it for the trial. *Ib.*
5. Whenever a person testifies, either voluntarily or under process of subpoena, to matters pertinent and material in a proceeding before a court or magistrate of competent authority, he is entitled to unqualified protection against any action for defamation by the words thus uttered. And this rule applies in the case of a physician furnishing evidence that a person is insane, in a proceeding under the statutes of the State, for the confinement of such insane person. *Supreme Ct., 1860, Perkins v. Mitchell, 31 Barb., 461.*
6. Though where a man is called to testify, or even makes an affidavit, in a cause depending in a court of competent, general, or ordinary jurisdiction, and proceeding according to the course of the common law, he may not be required to know or to prove that all the facts existed, or all the steps had been taken, which were necessary to confer jurisdiction in the particular case, in order to establish that his testimony was a privileged communication; yet where he intervenes voluntarily in a special proceeding not known to the common law, and not resulting in a judgment according to its forms, he must see that jurisdiction is acquired, and that there is in reality a proceeding in court, before he can claim the privilege of a witness for libellous charges against another. *Ib.*

EXAMINATION OF PARTIES; SURROGATE'S COURT; TRIAL, 5-8.

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ASSISTANCE.

THE END.

Exd. H. D.
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